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IN THE

# Supreme Court of the United States

October Term, 1959

No. 264

EDGAR SMITH,

*Petitioner,*

vs.

STATE OF NEW JERSEY,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

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## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of New Jersey affirming the conviction of the petitioner in the lower Court, for the crime of Murder in the first degree. Petitioner is under execution of the death sentence. The said sentence was stayed by this Honorable Court by Mr. Justice William J. Brennan on the 19th day of June, 1959, pending the filing of this petition.

### Opinion

The opinions of the Supreme Court of New Jersey are reported in 27 N. J. 433 (1958) and 29 N. J. 561 (1959).

### Jurisdiction

Within the time prescribed by 28 U. S. C. Sec. 2101(c) petitioner served and filed his petition for a Writ of Certiorari to the Supreme Court of New Jersey. The jurisdiction is invoked and authorized by 28 U. S. C. Section 1254 (1) and 28 U. S. C. 1257(3).

## Questions Presented for Review

1. Was the defendant-petitioner denied due process of law under the XIV Amendment in a quasi-judicial proceeding by the prosecutor, without arraignment, after a prolonged and massive police interrogation when the petitioner "suspect" became "defendant" without being advised of his constitutional rights that he might remain silent, be represented by counsel and that what he said could be used against him and would a violation of these fundamental rights vitiate a so-called unsigned and involuntary "confession" extracted under these circumstances?

A. May we accept as evidence the alleged "confession" extracted during the very course of (at least) quasi-judicial proceedings, when the time for investigation had passed and when the petitioner was no longer a "suspect" but then a "defendant" and where police and prosecutor failed to observe the "fundamental fairness" essential to the very concepts of justice?

2. At what point in a police interrogation which takes the form of an inquisition does the status of "suspect" become "defendant" which would entitle him to arraignment, without unnecessary delay, before an examining Magistrate and to be advised of his legal and constitutional rights?

3. Would the holding of a "suspect" in custody incommunicado for upwards of twenty (20) hours without arraignment, without counsel, without advice of his rights and without sleep, or rest and little food and scant clothing through a freezing cold night of around-the-clock police massive interrogation culminating in a prosecutor-conducted and deceptive inquisition extracting a so-called "confession", as the sole evidence of the People's case; and the subsequent unlawful averment or acknowledgment of the accuracy of a question and answer statement, justify the

outlawing of this involuntary and unsigned "confession" and the reversal of said conviction based thereon?

4. Would the subsequent testimony of the defendant at his trial when he recanted said confession as "made-up" and "lies" and told a story implicating another, absolve the unlawful effect of the so-called "confession", even though said "confession" was used and employed by the People in support of the prosecution throughout the trial, throughout the summation and final argument on behalf of the State and stressed in the Judge's charge and was concededly and solely the People's case?

5. Was the presence of a juror, a member of the current trial jury panel, which "juror" was concededly present and participating in the investigation, interrogation and "confession" of the petitioner at police headquarters, at the scene of the crime, and elsewhere, and at the prosecutor's office, as well as the presence of a member of the Grand Jury Panel, so prejudicial and detrimental to the interests and fundamental and constitutional rights of the petitioner as to deny him a fair and impartial trial by a jury of his peers, in violation of the due process clause of the XIV Amendment?

6. Was the Judge's charge, wherein the trial Judge himself a father of a 15-year old girl, presiding, (involving a murder of a 15-year old girl) overcome emotionally during the trial and delivering a charge to the jury that amounted to a scathing denunciation in the case, an erroneous and misleading enunciation of the evidence in the case, in reviewing solely the People's case and not saying one word about the defense, whether there be "voluntariness" of the confession, degree of "temporary insanity" or whether the alleged crime could have been committed by some other person as petitioner so contended; and over and over again repeating the highly prejudicial and inflammatory descriptions of "braining" "decerebration" "skull-crushing" "blood-stained area" "blood-drenched

rocks" "blood-marked baseball bat" "death-dealing" blows, "Body torn" "mutilated" "clothing torn away" "breasts exposed" "brains separated from the head" "face bashed", etc., in a most gruesome and word-sordid portrayal imaginable *far* from what to be expected from a fair and impartial trial Judge, summarizing fairly and impartially both sides of the case and the applicable law for the State and defense; such a departure from the accepted and usual course of judicial behavior as to deny the petitioner a fair and impartial trial under the XIVth Amendment of the United States Constitution?

7. Was the failure of the trial Judge to submit to the jury under this common law murder indictment all possible degrees of homicide including the crime of manslaughter, as well as murder in the first and second degrees, such a departure from the usual standards of judicial procedure as to be in deprivation of the defendant's fundamental rights and a violation of due process in violation of the XIVth Amendment?

8. Was the introduction into evidence, over objection, of highly prejudicial and inflammatory color slides and color enlargements (16 x 20) of the deceased and scene of the crime and not materially or essentially necessary to the proof of the People's case and on continuous display in front of and in the presence of the trial jury throughout the trial, such a departure from the usual standards of judicial procedure and a denial to the petitioner of a fair and impartial trial, as to be in deprivation of his fundamental rights and in violation of the due process clause of the XIVth Amendment?

A. Was any logical relevance of such exhibits so overwhelmed by their inherently prejudicial qualities and of a psychological nature, that should have precluded their admission into evidence?

9. Was the serious inadequacy of the trial attorney of such import in his inadequate representation of petitioner

and presentation of his defense and to such a degree as to denote a failure of defense and denial of counsel under the XIVth Amendment of the United States Constitution and be a denial of due process?

10. Was the denial of the trial court, on a motion for a new trial, based upon newly discovered evidence showing a false alibi of a "prime suspect" implicated by the petitioner and "a pre-judging" by a prejudicial trial juror, such an abuse of discretion in denying the petitioner a fair and impartial trial as to be considered denial of due process under the XIVth Amendment?

A. Was the failure of the trial judge to hold a proper hearing under said motion for a new trial, examining into the time of death which was most crucial in the People's case and the petitioner's defense, such a departure from the usual standards of judicial procedure as to be a denial of due process of law?

B. Was the failure of the trial Judge upon the presentation to him of a showing or at least a serious suspicion of "perjury" in the trial concerning the presentation of a "false alibi" by a "prime suspect" other than the petitioner, such a dereliction and neglect in not conducting a full inquiry and hearing as a committing magistrate, as to be considered a departure from the usual standards of judicial procedure and a denial of due process of law to the petitioner?

11. Was the motion for a new trial based upon newly discovered evidence, such a judicial proceeding as to require the presence of the defendant-petitioner at such stage of the proceedings, and would the denial of the production of and the presence of the defendant-petitioner at the said hearing of substantial issues of fact as to events in which the defendant-petitioner participated, be such a denial of due process of law and deprivation of his fundamental right to be present at every stage of the proceedings, so as to constitute a violation of the VIth Amendment of the United States Constitution?

## Constitutional and Statutory Provisions Involved

The Constitutional provisions involved in this case are the Fifth, Sixth and Fourteenth Amendments of the Constitution of the United States, the pertinent portion of which reads as follows:

Sec. 1. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U. S. C. A., Constitution, Amendment 14.

Article V: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Article VI: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The New Jersey Revised Statutes (Rule 3:2-3 of the Rules of Criminal Procedure), provide:

"(a) APPEARANCE. An officer making an arrest under a warrant issued upon a complaint shall take the arrested person, without unnecessary delay, before the court or magistrate named in the warrant. A person making an arrest without a warrant shall take the arrested person, without unnecessary delay, before the nearest available magistrate and a complaint shall be filed forthwith and a warrant issued thereto. A preliminary hearing before the magistrate shall be held forthwith.

(b) PRELIMINARY HEARING. The magistrate shall inform the defendant of the complaint against him, of his right to retain counsel or, if indigent, of the privilege of having counsel assigned, and of his right to have a preliminary examination. The magistrate shall allow the defendant reasonable time and opportunity to consult counsel. He shall also inform the defendant of his right to make a statement not under oath as to the charge against him, that he is not required to make such a statement and that any statement made by him may be used against him. If the offense charged may be tried by the magistrate upon waiver of indictment and trial by jury, the magistrate shall so inform the defendant. All waivers of indictment and trial by jury shall be in writing, signed by the defendant, and shall be filed and entered on the docket."

## Statement of the Case

Briefly, the petitioner, a twenty-three year old ex-Marine, married with one child, was convicted of the murder of one Victoria Zielinski, a 15-year old girl, at Mahwah, in Bergen County, New Jersey, on the night of March 4, 1957. He was tried in the Bergen County Court amidst an atmosphere of wide-spread publicity in the public press and intense hostility at the time and during the trial and inflamed prejudice by the Prosecutor and Pre-

siding Judge at the time of and during the trial; convicted on May 13, 1957, and sentenced to death on June 4, 1957.

The petitioner appealed said Murder conviction and death sentence to the New Jersey State Supreme Court, which was sustained on June 25, 1958 (27 N. J. 433-466 (1958)).

Thereafter, petitioner moved for a new trial, based upon newly discovered evidence, which was denied by the trial court Judge. Petitioner then sought to review the denial of said motion by appeal to the New Jersey State Supreme Court, which affirmed the holding of the lower Court on May 4, 1959 (29 N. J. 561 (1959)).

Defendant is now held in the Death House, at Trenton, New Jersey, under a new death warrant (the execution being stayed, by this Honorable Court, *supra*).

## The Facts

We accept the following statements from the opinion of the Supreme Court of New Jersey as correct, so far as they go:

"On March 4, 1957, at about 8:35 P. M., the deceased, Victoria Zielinski, 15 years of age, was walking along Wyckoff Avenue, Ramsey, New Jersey. She had visited a friend and was on her way home, more than half a mile away. The defendant, Smith, who knew her casually, happened along in a borrowed car and undertook to drive her there. Instead of going directly to her home, he drove to an isolated sand pit in the neighborhood and parked. There, according to his confession, for no apparent reason the young lady said she was going to get out of the car and walk home. She said also that she intended to tell her father that he was "like the rest of the guys". He tried unsuccessfully to prevent her from getting out and when he tried to follow her, she began to yell and slap at him

He then swung at her "as hard as" he "could" with his right hand: "I don't know whether it was a fist or a slap or what." He did not know if he actually struck her. From that point on, things were vague in his mind, i.e., "that's where somebody pulled the switch." He next remembered getting back into the car alone. In the interval of vagueness he did not know whether he had struck at her more than once or whether he did so with an object other than his hand. He had a "feeling of running somewhere" or "chasing somebody". He thought he recollected "running in the sand with my shoe off." On getting back into the car, his right foot was cold; later he became aware that he had lost his shoe. When he left the sand pit, Victoria's schoolbooks and pocketbook were in the car. After proceeding a short distance, he thought he probably threw them into the woods. In accordance with information furnished by him, the police later located them there. On reaching home, he realized that his khaki trousers and socks were bloody. He changed the trousers, went back to the pit with a lantern, and retrieved his right shoe. Later the trousers, socks, and shoes were disposed of in the manner referred to in Justice Wachenfeld's opinion. 27 *N. J.* at 444-445.

At the trial, Smith testified that he and Miss Zielinski quarreled while they were parked at the sand pit and he told her to get out of the car. She did so and started walking down the road. The events that allegedly occurred thereafter are recited in the earlier opinion as follows:

> "A few moments thereafter, while he was preparing to leave the pit, defendant heard a commotion and saw two figures coming up the road. He quickly got out of the car and his 'bad' ankle, which had been struck by a bowling ball earlier in the day, collapsed under him, his right shoe coming off. Since the identities of the oncoming persons were unknown and it was a lonely spot, he seized the baseball bat from the back seat of the car for protection.
>
> "As the figures approached, he recognized them as Victoria and D. H. what had happened, and the

> latter replied the girl had fallen on the road. Smith examined the wound and in the process got blood on his hands and trousers. Feeling she should be taken to a doctor, he placed her in the automobile, but D. H. grabbed her and forcibly pulled her out, telling Smith to leave her alone, that he, D. H., would take care of her. Victoria pleaded with Smith for succor, but since D. H. knew her much better than he, Smith decided he should not interfere further and drove off, leaving his shoe and the baseball bat behind." 27 *N. J.* at 446-447.

Smith's home was a short distance away. He drove there, washed up, changed his trousers, telephone Joseph Gilroy, whose car he had been driving, and departed at about 9:10 p.m. to pick Gilroy up. On the way, he revisited the said pit and retrieved his shoe.

Repetition of the above portion of the facts of the tragedy has been engaged in to point out the time element involved. On the basis of Smith's testimony at the trial, he picked up Miss Zielinski at about 8:34 p. m. (although at one point he said it was about 8:40 or 8:45 p. m., "it could have been later or could have been earlier.") He must have left Miss Zielinski and D. H. (Don Hommell) at the said pit before 9 p. m. because after driving home, talking to his wife (who testified he arrived home shortly before 9 p.m.), washing up, changing his trousers and socks, attempting unsuccessfully to start a gasoline heater in the trailer where they lived, and making his telephone call, he left home at about 9:10 p. m. to pick up Gilroy. Thus the import of his allegation at the trial was that D. H. (Don Hommell) appeared at the said pit shortly before or around 9 p. m. And the conclusion which the defense sought to have the jury reach was that Don Hommell committed the murder."

To this should be added the following: (taken from the summary in the original appeal opinion in the New Jersey State Supreme Court):

Because the weather had been below freezing the county medical examiner was unable to fix precisely the time of death, but his estimate placed the time of death "around 12:30 or 1:00 A. M.—* * * give or take an hour".

The death certificate signed by him (but not produced at the trial) discloses the time of death "about 10:00-11:00 P. M." The autopsy medical report revealed the cause of death as "total crushing of the skull with decerebration, traumatic" * * * by a rock or stone; death was instantaneous.

Acting on information supplied by Gilroy (from whom petitioner borrowed the car used the night of the tragedy) at about 11:30 P. M. on March 5 (1957), Detective Graber and other officers went to Ridgewood and took Smith into custody. Smith was removed to Mahwah Police Headquarters and there interrogated. After all-night interrogation by police and prosecutor and after his trip to the sand-pit in the company of the officers, Smith was taken to the prosecutor's office and questioned further by Detective DeLisle (attached to the prosecutor's office staff) who testified that Smith broke down that morning and made certain "admissions". Subsequently, the petitioner gave the "confession" (note—Exh. S-84). Subsequently Smith, on the advice of his attorney, refused to sign the statement ("confession") but allegedly conceded its accuracy. It was admitted into evidence at the trial, over objection.

The "confession" was "vague", as to the recollection of the events of the night of the tragedy.

**Post-script to murder:** *The petitioner, concededly, was at or near the scene of the crime late (then 9-9:30 P. M. night of the tragedy.*

## Reasons for Granting Petition for Writ of Certiorari

The compelling reasons in this capital case for granting the petition for writ of certiorari hereinare set forth in the "QUESTIONS PRESENTED FOR REVIEW" assuming the questions to be the said facts; and the points raised in the "ARGUMENT" that follows herein, all showing a denial of due process of law and an invasion of the petitioner's constitutional and fundamental rights under the Vth, VIth and XIVth Amendments to the United States Constitution.

The petition herein is addressed to the sound disgretion of this Honorable Court because this Murder conviction and death sentence involves a review of the above as well as the interpretation of a state statute under the United States Constitution (not before decided by the highest Appeal Court in the State of New Jersey), lawfully requiring an arraignment without unnecessary and unreasonable delay before a magistrate; right to counsel; right to examination; and the effect of an unsigned and involuntary confession extracted after an extended interrogation and inquisition by the police and prosecutor, sole and primary evidence in the people's case, convicting petitioner of Murder and sentencing him to death; the denial of a fair and impartial trial; inadequate defense presentation and representation; failure of submission to the trial jury of all possible degrees of homicide; the absence of the petitioner at a judicial hearing for a new trial; the unlawful presence at various stages of the investigation, interrogation and "confession" of the member of the Grand Jury Panel and Trial Jury Panel; and the sanctioning of departure by a Lower Court from the accepted and usual course of judicial proceedings and to call for the exercise of this Honorable Court's power.

## ARGUMENT

### I

**The petitioner-defendant herein was denied due process of law under the Fourteenth Amendment by the admission into evidence over objection of an unsigned so-called "confession", the sole evidence convicting him of murder which was taken from him involuntarily and while in custody after the said petitioner was held incommunicado for a period of upwards of twenty (20) hours through a freezing cold night in an around-the-clock prolonged and massive inquisition by in excess of a dozen officials, without counsel, no sleep, no rest, little food and scant clothing, culminating in a prosecutor-conducted, deceptive and extended interrogation extracting said "confession", allegedly under oath when he (petitioner) was no longer "suspect" or witness but a "defendant" and without being advised of his constitutional rights that he could remain silent and be represented by counsel and without arraignment; and the subsequent unlawful attempt by the prosecutor, after his (petitioner's arraignment and being represented by counsel of record and subsequent indictment to further trick and cajole him in signing said "confession" by a stealthily unauthorized visit to his prison cell, which statement and the averment or acknowledgment of the accuracy or truth of same were unlawfully obtained and admitted in evidence against him.**

The alleged "confession" (in the form of a transcript of interrogatories) was objected to in the Court below both as to whether the same could even be considered a "confession" and as to its "voluntariness". A reading of the said "confession" (Exh. S-84)* by this Honorable Court

* Unless otherwise indicated all references are to pages of the trial record.

would clearly show that it was strange indeed for this petitioner to "voluntarily", as the State contended, "confess" a crime without possessing the basic and fundamental elements and knowledge so vitally and legally necessary, as to how the crime was even perpetrated.

This case goes beyond the holdings of the *Crooker v. California*, 357 U. S. 433, and *Cicenia v. Lagay*, 357 U. S. 504 (where the bare fact of police detention and police examination in private of one in state custody did not per se render involuntary and unlawful a confession by one so detained), and, as in *Spano v. New York*, decided June 22, 1959, this Honorable Court held:

> "The police were not therefore merely trying to solve a crime, or even to absolve a suspect. Compare Crooker v. California, supra, and Cicenia v. Lagay, supra. They were rather concerned primarily with securing a statement from defendant on which they could convict him. The undeviating intent of the officers to extract a confession from petitioner is therefore patent. When such an intent is shown, this Court has held that the confession obtained must be examined with the most careful scrutiny, and has reversed a conviction on facts less compelling than these."

We maintain that the petitioner's status here changed from "suspect" to "defendant" and, as such, he was lawfully entitled to every safeguard that the law and the United States Constitution give to him (See *Spano v. New York, supra*).

If this were not so, the status of "suspect" or "witness" would never change and one could thus be held incommunicado without warrant, without charge, without counsel, without arraignment, *ad infinitum*.

At what point, we ask, does the "suspect" or "witness" status become that of "defendant"?

At what point in the so-called investigation does his status change from "suspect" or "witness" to "defendant?"

Or at what point would the "suspect" become absolved; provided he withstands the inquisition and does not by fatigue, undue influence or as a "means to an end" succumb and "confess"?

Of course, each case is dependent upon the facts and circumstances; but what is the yardstick—minutes, hours, days? Would twenty (20) hours be too long? Or thirteen (13) hours too short?

In *Ashcraft v. Tennessee*, 322 U. S. 143 (1944) thirty-six (36) hours was considered too long and shocked one's conscience; other cases held as little as seven (7) hours was unlawful (See *Mallory v. U. S.*, 354 U. S. 449).

In the instant case, we have a lapse of thirteen (13) hours from 11:00 the night of March 5th, when the petitioner was taken into custody, to about 1:00 P. M. of March 6th, with the extended inquisition and interrogation that led to the "confession"; and the further extension of the inquisition seven (7) hours more until the evening (7:00 P. M.) before the petitioner was arraigned on a charge of "murder", a total of *twenty (20) hours* that the petitioner was thus unlawfully held.

Surely, the petitioner did not steadfastly deny his participation through the night to expert police interrogators and then suddenly decide the following day to "confess" to the prosecutor.

The proceeding before the Prosecutor in the County Courthouse where his offices are situated, was in the nature of a quasi-judicial proceeding; but it utterly lacked the standard of protection that the Constitution guarantees to every defendant. The proceeding should have lawfully been before an examining magistrate, in an open courtroom, with all legal safeguards.

Prior to his "confession" to the prosecutor, the Petitioner had made "incriminating admissions" after prolonged and exhausting questioning by the police, by placing himself at the "scene of the crime" on the "night of the crime", by identifying the clothing that he had discarded, particularly his shoes, which proved to be (according to the police) an exact duplicate of the plaster cast impression (Exh. S-75) found at the scene of the crime (p. 469a). As a matter of record, "*Acting on the information supplied by one Gilroy* (the owner of the Mercury car Petitioner borrowed that night) that he noted blood stains in his car and of the baseball bat being missing from his car (subsequently discovered near the scene of the crime, ingrained with blood) at about 11:30 P. M. on March 5th, *Detective Graber and other officers went to Ridgewood and took Smith into custody.* Smith was removed to Mahwah police headquarters and there interrogated." By strange coincidence and circumstance, *this was the very site* of petitioner's arraignment, at about *7 P. M. on March 6th, twenty (20) hours later!* Was there not sufficient to hold the petitioner as a defendant for murder? If not then, when? (See *infra.*)

Subsequently, he is supposed to have "broken down" to the police, in the morning after the all-night grilling, and admitted "that he met the girl that night on the road and that he had picked her up in his automobile and taken her to the said pit (p. 519a). He said she had babbled something about school and a note, that she got excited and that she attempted to get out of the car, he held on to her and she had the advantage because she was on the door side of the car and she pulled him out of the car. He said he got excited and he hit her and he indicated in this way (indicating), he said a good shot" (p. 519a).

Although there was sufficient circumstantial evidence to hold the petitioner as a defendant (*although not to convict him without a confession*) he was not booked or ar-

raigned as a defendant when taken into custody (*supra*) or even after the all-night inquisition by a relay of police officials (including the prosecutor) after being dragged through the night from police station to station to the "scene of the crime" and literally dragged through the streets searching for further clues "to hang" the petitioner.

The stage was set the following day for a "confession", not just a question-and-answer session with the prosecutor. Apparently the police made the defendant "ready" after the all-night *inquisition* and the "lamb was now ready for the slaughter." After being "introduced" (to the police officers, the prosecutor said he already knew), the prosecutor opened his quasi-judicial "confession session" by saying (Exh. S-84, p. 1072a):

> "I am going to ask you some questions, *Ed*, concerning an *incident* that occurred in Mahwah and one Vickie Zielinski." (Emphasis ours.)

The petitioner ("Ed") is not told of the brutal killing of this girl, etc., how she was bludgeoned to death, etc., but of an "incident", with the casualness of discussing a moving picture or television show. Furthermore, there is *no evidence* in the record, that the police previously apprised the petitioner of the crime.

Then, without warning petitioner of the charge or that he may remain silent, etc., the prosecutor cunningly led this young ex-marine who had just lost his job and spent two sleepless nights (one in custody) surrounded by a host of police officials without counsel, etc., down the road to doom.

A reading of the S-84 Exhibit, stenographic transcript of the so-called "confession", allegedly under oath, by leading questions and cross-examination, proves beyond question that the petitioner was, at least, at that time—*a defendant* (see below).

The caption of the transcript plainly reads:

"STATE OF NEW JERSEY,

vs.

EDGAR H. SMITH,

Defendant.*

CHARGE: MURDER

Office of the Bergen County Prosecutor
Courthouse, Hackensack, New Jersey
Wednesday, March 6, 1957—12:50 P. M.

Present:

1. Edgar H. Smith.
2. Fred C. Galda, First Assistant Prosecutor of Bergen County.
3. Juror, Louis M. Kalstad.**
4. Charles E. Smith, Chief of the Mahwah Police Department.
5. Harry Voss, Chief of the Ramsey Police Department.
6. Walter Spahr, Bergen County Detective.
7. Arthur J. Ehrenbeck, Official Stenographic Reporter."

• • •

The only mention that could even be construed as alluding to "voluntariness", would be casual inquiry of the prosecutor "are you willing to give a *voluntary* statement concerning *this incident?* (Emphasis ours.)

What incident? There is no proof of any "incident" or that the defendant was previously confronted by the facts of any incident, which in fact was a "gruesome homicide."†

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* NOTE: The designation "Defendant" and the CHARGE: MURDER (*supra*).

** NOTE also above-listing of presence of "juror"!

† The "incident", is subsequently at the trial, described by the prosecutor, in his *opening* to the jury: "This was a brutal, a savage, a sadistic killing" (p. 182a). Apropos of these prosecutor remarks, note the "confidence game" treatment given this defendant throughout the said "confession" and subsequent thereto.

Quite the contrary; defendant subsequently testified at his trial that he didn't know of the crime except what he heard or read in the newspapers.

No police official or prosecutor advised him of the murder, that they were asking him to confess; and only one statement in the confession that this was to be a "voluntary" statement concerning "an incident", *not a murder, or homicide mind you, but* just an incident!

Was this prosecutor so squeamish about mentioning "murder" or "killing"? He never once through the lengthy examination ever asked the petitioner if or how he killed the girl in question!

What "incident"? The fact that the petitioner was at the scene of the crime that night with the deceased in the sand-pit, a known lover's lane?

Is this a fair and proper foundation to query "the accused" to get him to confess a murder?

The trickery and cajoling and false sympathy extended to this "suspect-defendant" about to confess a "murder" is also portrayed by the following:

> "By the prosecutor: Before we start do you want some coffee or anything?
> Q. Do you like black coffee or regular coffee?
> Q. Do you like some cream in your coffee?"

Mind you, all this solicitude about a cup of coffee, but not one query whether the Petitioner would like to have a lawyer or counsel present. Also, this "solicitous" prosecutor did not advise the Petitioner that he had a constitutional right to remain silent and that what he said could be used against him.

Thus, in this casual innocuous way, begins the examination by a skilled prosecutor of a naive defendant, which brings this young man to the brink of his doom.

Asking defendant if he would make a "voluntary" statement leaves no argument to demonstrate that "voluntary" is but a conclusion and the prosecutor should have lawfully and properly asked the Petitioner if he would make a statement on his own, without counsel and with the full realization that what he said might be used against him. The prosecutor's responsibility to safe-guard the defendant's constitutional rights, became even greater when *he* chose "*to hold court*" in the inner sanctum of his offices, instead of in an open and public courtroom, where *the defendant* should have then been lawfully arraigned.

As Mr. Justice Douglas characterized in the *Spano* case (*supra*):

> "This is a kangaroo court procedure whereby the police produce the vital evidence in the form of a confession which is useful or necessary to obtain a conviction. They in effect deny him effective representation by counsel. This seems to me to be a flagrant violation of the principle announced in Powell v. Alabama (supra) that the right of counsel extends to the preparation for trial, as well as the trial itself. As Professor Chafee once said, 'A person accused of crime needs a lawyer right after his arrest probably more than any time.' Chafee, Documents on Fundamental Human Rights, Pamphlet 2 (1951-1952, P. S-41). In that event the '*secret trial*' in the police precincts '*effectively supplants the public trial guaranteed by the Bill of Rights*'." (emphasis ours)

*In Powell v. Alabama*, 287 U. S. 45:

> "The original constitution of New Jersey of 1776, article XVI contained a provision like that of a Penn charter to the effect that all criminals shall be permitted to the same privileges of counsel as their prosecutors."

New Jersey constitution has adopted English common law before the adoption of the Federal constitution.

Is there any question, that Petitioner was "accused of crime" after his "arrest" and in need of a lawyer prior to and during the inquisition (*supra*)?

In line with the above, it is urged that the confession obtained herein was not voluntary and was not the exercise of Petitioner's free will and that the common law dealing with physical coercion, which has now been construed to include psychological coercion, is not the sole standard to be employed prior to sending a defendant to his death, "and that there always remains the restraining and protective arm of the XIV Amendment to call upon the States to give an account of their stewardship of all persons and citizens, both Federal and State."

The Petitioner here was in every respect treated as *a defendant*, except the formality of being charged and arraigned for murder; which, of course was *so unnecessarily and unreasonably delayed* (*supra*) as would have accorded him the legal and constitutional protection, the police and prosecutor sought to avoid.

See *Bram* v. *U. S.*, 168 U. S. 532 and *Lisenba* v. *California*, 314 U. S. 219.

Taken together, the *Bram* and *Lisenba* cases hold that a coercive or compelled confession cannot be used to convict a defendant in any State or Federal court.

"The Sheriff's deputies set themselves up as a quasi-judicial tribunal and tried—and convicted him there and in so doing rendered a trial—before a trial court—and the Jury of Peers—a mere formality (here the prosecutor and police so acted).

"The aid of counsel in preparation would be farcical if the case could be foreclosed by preliminary investigation which would squeeze out conviction by means unconstitutional if used at the trial.

Cooley's Constitutional Limitations, 6th Edition;
*Wood* v. *U. S.*, 309 U. S. 227;
*Vanty* v. *Alabama*, 309 U. S. 629;
*White* v. *Texas*, 310 U. S. 530;
*Lisenba* v. *California* (*supra*);
*Bram* v. *U. S.* (*supra*).

"Provided that he is so prejudiced thereby as to infect his subsequent trial with an absence of 'that fundamental fairness essential to the very concept of justice'. The determination depends upon all the circumstances of the case."

*House* v. *Mayo*, 324 U. S. 42, shows petitioner to have been "taken advantage of" to violate due process of law.

In *Glasser* v. *U. S.*, 314 U. S. 60:

"The right to have assistance of counsel is too fundamental to allow courts to indulge in nice calculations. As to the amount of prejudice arising from his denial, the Crooker case also refers to the Betts v. Brady case where the denial of counsel was not prejudicial. But it must be mentioned that this was not a capital case and the dissent in the Crooker case was reluctant and cautious so that the majority opinion not be extended to capital cases."

An admirable summary of the generally expressed judicial attitude towards these practices is set forth in the report "Lawless Enforcement of Law", by the Americal Journal of Police Science:

> "Holding incommunicado is objectionable because arbitrary—at the mere and unregulated pleasure of a police officer. The use of third degree is obnoxious because it is secret; because the prisoner is wholly unrepresented; because there is present no neutral impartial authority to determine questions between the police and the prisoner; because there is no limit to the range of the inquisition nor the pressure that might be put upon a prisoner".

We are mindful of the holding in the *Cicenia* v. *Lagay* (*supra*) case and *Crooker* v. *California* but we do not rely solely upon this claim but we urge an *accumulation of deprivation of the defendant's legal and constitutional rights.*

Although the said *Cicenia* case held that it did not mean to inflict any "constitutional compulsion" on the States nor limit its police powers, it stated that it depended upon the circumstances and that "fundamental fairness" was the test.

We submit that the within accumulation of deprivation of the defendant's rights does not meet the test of "fundamental fairness".

We do not come within said case but rather the cases of *Mallory* v. *U. S.*, *supra*, *Ashcraft* v. *Tennessee*, *supra* (and others), and the more recent case of *Spano* v. *New York*, *supra*, decided as recently as June 22nd, 1959. There, this Honorable Court held that it was not necessary to distinguish the *Crooker* v. *California*, *supra* case and the *Cicenia* v. *Lagay*, *supra* case on the ground that in those cases no indictment had been returned; for it finds "use of the confession obtained there inconsistent with the XIVth Amendment under tradational principles."

The Chief Justice, there, speaking for the Court, further held:

> "The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves. Accordingly,

the actions of police in obtaining confessions have come under scrutiny in a long series of cases.*

These cases suggest that in recent years law enforcement officials have become increasingly aware of the burden which they share, along with our courts, in protecting fundamental rights of our citizenry, including that portion of our citizenry in respect of the crime. The facts of no case recently in this court have quite approached the brutal beatings in Brown v. Miss., 297 U. S. 278 (1936), or the 36 consecutive hours of questioning present in Ashcraft v. Tenn., 322 U. S. 143 (1944). But as law enforcement officers became more responsible, and *the methods used to extract confessions more sophisticated*, our duty to enforce Federal constitutional protections does not cease. It only becomes more difficult because of the more delicate judgments to be made. Our judgment here is that, on all the facts, this conviction cannot stand" (emphasis ours).

Although the record does not disclose this, the petitioner was "obliged" to change from his street clothes to *prison-denims*; *this before* the confession! Psychologically, this new attire obviously conditioned the mind of petitioner for the confession. This reprehensible

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* E.g., *Ciccnia* v. *Lagay*, 357 U. S. 504; *Crooker* v. *California*, 357 U. S. 433; *Ashdown* v. *Utah*, 357 U. S. 426; *Payne* v. *Arkansas*, 356 U. S. 560; *Thomas* v. *Arizona*, 356 U. S. 390; *Fikes* v. *Alabama*, 352 U. S. 191; *Leyra* v. *Denno*, 347 U. S. 556; *Stein* v. *New York*, 346 U. S. 156; *Brown* v. *Allen*, 344 U. S. 443; *Stroble* v. *California*, 343 U. S. 181; *Gallegos* v. *Nebraska*, 342 U. S. 55; *Johnson* v. *Pennsylvania*, 340 U. S. 881; *Harris* v. *South Carolina*, 338 U. S. 68; *Turner* v. *Pennsylvania*, 338 U. S. 62; *Watts* v. *Indiana*, 338 U. S. 49; *Lee* v. *Mississippi*, 322 U. S. 742; *Haley* v. *Ohio*, 332 U. S. 596; *Malinski* v. *New York*, 324 U. S. 401; *Lyons* v. *Oklahoma*, 322 U. S. 596; *Ashcraft* v. *Tennessee*, 322 U. S. 143; *Ward* v. *Texas*, 316 U. S. 547; *Lisenba* v. *California*, 314 U. S. 219; *Vernon* v. *Alabama*, 313 U. S. 547; *Lomax* v. *Texas*, 313 U. S. 544; *White* v. *Texas*, 310 U. S. 530; *Canty* v. *Alabama*, 309 U. S. 629; *Chambers* v. *Florida*, 309 U. S. 227; *Brown* v. *Mississippi*, 297 U. S. 278.

piece of business on the part of the police and or prosecutor is another "link in the chain" of shackling this boy's fundamental and constitutional rights.

Here, as in the *Spano* case (*supra*), "he was subjected to questioning not by a few men, but by many (15 named). All played some part" as this Honorable Court held, "and the effect of such massive official interrogation must have been felt" (here the record discloses "in excess of a dozen of police and prosecutor officials" (p. 540a); in fact, *twenty* (20)):

1. Prosecutor Calissi
2. 1st Assist. Pros. Galda
3. Chief of Ramsey Police Voss
4. Chief of Mahwah Police Smith
5. Dect. Capt. DeMarco
6. Dect. Chief Stewart
7. Mahwah Police Capt. Wickham
8. Mahwah Police Lt. Haight
9. Dect. O'Har
10. Dect. Sinatra
11. Dect. Graber
12. Dect. De Lisle
13. Dect. Spahr
14. Dect. Garabidian
15. Dect. Ridgeway
16. Ramsey Police Lt. Doremus
17. Investigator Nunno
18. Investigator Perrapato
19. County Medical Examiner, Dr. Gilady
20. Stenographer Ehrenbeck

*There*, the petitioner was questioned for virtually eight straight hours before he confessed after all-night fatigue. *Here*, the petitioner was questioned for virtually twenty (20) hours through the night and late into the next day before he "confessed".

Here, the "massive, official interrogation" began the night of March 5, 1957, by "in excess of a dozen police officials" (including the prosecutor) and continued throughout the night, culminating in the extended inquisition by the prosecutor the following day ending in the petitioner's confession the afternoon of March 6th (p. 593a). "The method" used by the prosecutor was "sophisticated", indeed.

As in the *Spano* case (*supra*) "in such circumstances slowly mounting fatigue does and is calculated to play its part".

Here, with the petitioner ill and no sleep the previous night, no sleep or rest the following night nor the following day (Smith's preliminary testimony, pp. 539a-542a) "slowly mounting fatigue" played its part. We must conclude "that Petitioner's will was overborn by official pressure, fatigue and 'confidence' falsely aroused." (See *Spano* v. *New York*, *supra*.)

Even though there was no evidence of physical coercion or psychological coercion, this Honorable Court stressed in the case of *Haley* v. *Ohio*, 332 U. S. 596 that:

> "the defendant's age and absence of counsel and the police working in relays over a period of 5 hours to override the defendant's judgment".

Mr. Justice Frankfurter, in said case, in a concurring opinion, pointedly stated:

> "it is suggested that Haley's guilt could easily have been established without the confession elicited by the sweating process of the night's interrogation. But this only affords one more proof that in guarding against misuse of the law enforcement process, the effective detection of crime and the prosecution of criminals, are furthered and not hampered."

And further at page 606:

> "'Conduct under duress involves choice'. Union Pacific R. Co. v. Public Service Commission, 248

U. S. 67, 70, and conduct devoid of physical pressure but not leaving a free exercise of choice is the product of duress as much so as choice reflecting physical constraint.

Unhappily, we have neither physical nor intellectual weights and measures by which judicial judgment can determine when pressures in severing a confession reach the coercive intensity that calls for the exclusion of a statement so secured. Of course, the police meant to exercise pressures upon Haley to make him talk. That was the very purpose of their procedure. In concluding that a statement is not voluntary which results from pressures, such as were exacted in this case to make a lad of fifteen talk when the Constitution gave him the right to keep silent, and when the situation was so contrived that appreciation of his rights, and thereby the means of asserting them were effectively withheld from him by the police. I do not believe I express a merely personal bias against such a procedure. Such a finding, I believe, reflects those fundamental notions of fairness and justice in the determination of guilt or innocence which lie embedded in the feeling of the American people, and are enshrined in the Due Process Clause of the Fourteenth Amendment. To remove the inducement to resort to such methods, this Court has repeatedly denied use of the fruits of illicit methods.

Accordingly, I think Haley's confession should have been excluded and the conviction based upon it should not stand."

In the case of *Malinski v. New York*, 324 U. S. 401, at page 404, it was stated as follows:

"If the attendant circumstances indicate that the confession was coerced or compelled, it may not be used to convict a defendant. Ashcraft v. Tennessee, supra, p. 154. And if it is introduced at the trial, the judgment of conviction will be set aside even though the evidence apart from the confession might have been sufficient to sustain the jury's verdict. Lyons v. Oklahoma, 322 U. S. 596, 597."

In the case of *Lyons* v. *Oklahoma*, 322 U. S. 596, 597, in a footnote at page 597, it was stated:

> "Whether or not the other evidence in the record is sufficient to justify the general verdict of guilty, is not necessary to consider. The confession was introduced over defendant's objection. If such admission of this confession denied a Constitutional right to defendant, the error requires a reversal." Bram v. United States, 168 U. S. 532, 540-542 and cases cited.

In the case of *Watts* v. *Indiana*, 338 U. S. 49 at 53, in an Opinion by Mr. Justice Frankfurter, at page, 50, it was stated:

> "Thus, while the State Courts have the responsibility for securing the rudimentary requirements of a civilized order, in discharging that responsibility there hangs over them the reviewing power of this court."

And, at page 53 of the said opinion, it was further stated as follows:

> "A confession by which life becomes forfeit must be the expression of a free choice. A statement to be voluntary of course need not be volunteered. But if it is the product of sustained pressure by the police it does not issue from a free choice. When a suspect speaks because he is overborne, it is immaterial whether he has been subjected to a physical or mental ordeal. Eventual yielding to questions under such circumstances is plainly the product of the suction process of interrogation, and therefore, the reverse of voluntary. We would have to shut our minds to the plain significance of what here transpired to deny that this was a calculated endeavor to secure a confession through the pressure of unrelenting interrogation. The very relentlessness of such interrogation implies that it is better for the prisoner to answer than to persist in the refusal of disclosure which is his Constitutional right. To turn the detention of an accused into a process of wrenching

from him evidence which could not be extorted in open Court with all its safeguards, is so grave an abuse of the power of arrest as to offend the procedural standards of due process.

This is so because it violates the underlying principle in our enforcement of the criminal law. Ours is the accusatorial as opposed to the inquisitorial system. Such has been the characteristic of Anglo-American criminal justice since it freed itself from practices borrowed by the Star Chamber from the Continent whereby an accused was interrogated in secret for hours on end. See Ploscowe, The Development of Present Day Criminal Procedures in Europe and America. 48 Harv. L. Rev. 433, 457-458, 467-473 (1935). Under our system, society carries the burden of proving its charge against the accused, not out of his own mouth. It must establish its case, not by interrogation of the accused, even under judicial safeguards, but by evidence independently secured through skillful investigation. 'The law will not suffer a prisoner to be made the deluded instrument of his own conviction.' 2 Howkins, Pleas of the Crown, C. 46, Sec. 34 (8th Ed., 1824). The requirement of specific charges, their proof beyond a reasonable doubt, the protection of the accused from confessions extorted through whatever form of police pressures, the right to a prompt hearing before a Magistrate, the right to assistance of counsel—the duty to advise an accused of his Constitutional rights—these are all characteristics of the accusatorial system and manifestations of its demands. Protracted, systematic and uncontrolled subjection of an accused to interrogation by the police for the purpose of eliciting disclosures or confessions is subversive of the accusatorial system. It is the inquisitorial system, without its safeguards. Law triumphs when the natural impulses aroused by a shocking crime yield to the safeguards which our civilization has evolved for an administration of criminal justice at once rational and effective."

In *Galegos v. Nebraska*, 342 U. S. 55, it was stated:

"One of the senses in which the Courts use the word 'voluntary', a confession of incriminating tes-

> timony taken from a defendant without warning of his rights, is not voluntary. This is a constitutional question of due process."

In *Powell* v. *Alabama*, 287 U. S. 45, a failure to allow defendant counsel has been declared a denial of due process and that right accrues the moment he is "charged" with crime.

Reference is again made herein to the Footnote to Mr. Justice Douglas' Dissent in *Crooker* v. *California*, *supra*, at page 446 thereof, wherein it is stated that the Scot's view was recently stated by the Lord Justice General in *Chalmers* v. *H. M. Advocate*, 1954 Sess. Cas. 66, 78:

> "The theory of our law is that at the stage of initial investigation the police may question anyone with a view to acquiring information which may lead to the detection of the criminal; but that, when the stage has been reached at which suspicion has in their view centered upon some person as the likely perpetrator of the crime, further interrogation of that person becomes very dangerous, and, if carried too far, e.g., to the point of extracting a confession by what amounts to cross-examination, the evidence of that confession will almost certainly be excluded. Once the accused has been apprehended and charged he has the statutory right to a private interview with a solicitor, and to be brought before a Magistrate with all convenient speed so that he may, if so advised, emit a declaration in presence of his solicitor under conditions which safeguard him against prejudice."

As Mr. Justice Stewart so vividly described "this was not an arraignment in a court of law but an all-night investigation in a prosecutor's office, a police station and an automobile." (See *Spano* (*supra*)).

*AND*:

> "the absence of counsel when his confession was elicited was alone enough to render it inadmissible under the 14th amendment"

This prosecutor who was sworn to uphold the U. S. Constitution, as the constitution of the State of New Jersey, designed to protect its citizens, was more interested in extracting a "confession" than in upholding the law.

So that there be no question of the part played by the prosecutor, in collaboration with the police, the prosecutor who "secured" this confession, engineered the "investigation" and "inquisition" from start to finish; as Mr. Justice Warren said in the *Spano* case, "until the drama was played out."

In view of Mr. Justice Warren's observation in the *Spano* case, as to *Crooker* v. *California, supra, Cicenia* v. *Lagay, supra,* there is no appreciable difference, between one held under indictment for murder, or one held as "a defendant" for murder; "we find it unnecessary to reach that contention", said this Honorable Court.

*As a matter of procedure, the evil is worse,* if a person is held "in custody" under "arrest" for murder and the prosecutor, not for the purpose of further investigation of the suspect, but solely for the designed purpose of confession, holds the "suspect" who is now *de facto, a defendant,* without formal charge, without arraignment and without counsel.

If this be permitted, then the purposes of the U. S. Constitution could be circumvented by this "Kangaroo court procedure" (*supra*).

There is absolutely no evidence in the record to disclose that petitioner was advised of the charge against him, or how the crime was perpetrated; except, as noted, that he heard or read something of the tragedy in the newspaper.

The petitioner acknowledged, at the trial, that he read that "Vickie" was dead, from a newspaper the afternoon of March 5th (the following day), but not as to details of the murder or the extent of the injuries, etc. He concededly

didn't know nor was he advised of same at the time of the alleged "confession", and not until the following Easter Sunday, when he was in prison, did he learn of this "bludgeon slaying" (p. 671a).

On cross-examination, the prosecutor prodded the defendant about his knowledge of the crime from a newspaper account of the murder (pp. 722a-3a) that "her head was crushed with a rock", only gaining the admission from petitioner that he understood from the newspaper that she suffered a "head injury" but knew nothing about the details of the crime.

Of course, this gives us cause to ponder, that if this "fair-minded" prosecutor had only made known to the Petitioner prior to or at the time of his "confession", the extent and details of the crime, we would not now have a dubious "confession" to a crime of which the *petitioner concededly had no knowledge.*

A reading of Exhibit S-84, the so-called "confession", portrays beyond question an astounding lack of knowledge by this petitioner, of the essential details of the crime to which he purportedly "confessed"; excepting, of course, the incriminating admissions that "I must have been the one who really did it"; "something snapped, that I did it—but couldn't convince myself", etc.

Did what? Did the petitioner once in this "confession" say that he bludgeoned this girl with a baseball bat or crushed her head with a rock? Nothing of the kind. It is a most peculiar incriminating and yet exculpatory "confession".

Concededly, the petitioner was not told or advised by the police or prosecutor before the confession, of the cause of death.

The Prosecutor attempts to get around this fatal defect by "inferring" knowledge of the crime from Smith's

"admitting" on cross-examination at the trial, that he had read about the case in a newspaper. But even this belated "admission", hardly cures the lack of knowledge or advice as to the *actual crime at the time* of his "confession".

We cannot infer this—it was the duty of the prosecutor to advise him so that petitioner was fully aware of the crime and the charge. We cannot speculate or summarize that he knew from a newspaper or what he heard over the radio or from what somebody told him, that he was fully apprised of the charge, etc., against him.

> "The New Jersey State Supreme Court, on appeal erroneously held the jury had a right to conclude that defendant was fully cognizant of the cause of Victoria's death at the time he confessed."

We question—from what? The Court and prosecutor cannot put the cart before the horse. The petitioner should have been apprised of the crime, etc. before or at the time of the so-called confession and the "confession" itself discloses this failure and omission, by the prosecutor. Here there was a defect on both grounds. Even though the legal grounds of objection to the confessin was in doubt on the trial and upon appeal, which doubt was attributable to inadequacy of counsel, the State Supreme Court held:

> "The confession was treated on appeal as though its introduction had been opposed on every conceivable ground."

This case abounds with serious error from start to finish. From its inception, the prosecution with its design for "confession" and ending with the "design" for death, this conviction must crumble since it was built on an illegal foundation, continuing with the prejudicial and inflammatory trial and ending with a conviction not based upon fair and unbiased deliberation by jury but by pre-judged and prejudicial jury (as noted in the "motion for a new trial").

It is significant to note that in the course of questioning in the confession, the prosecutor was concerned about the voluntariness and mistreatment of the defense but, by doing so, he "agrees" that petitioner was indeed and, in fact, "in custody" at the time:

> "Q. While you were *in custody* by the police up at Mahwah police headquarters, did anybody mistreat you, etc.?"

This was quite a question to ask the petitioner with the chief of police of Mahwah practically sitting at his elbow in the "group of interrogators" in the prosecutor's office.

"In custody" certainly denotes a status of a person "under arrest" rather than a mere "suspect" who is free to go at any time.

It is highly significant and enlightening to note that this "big-hearted" prosecutor gloated over the fact that after the "confession" that he (petitioner) was taken by the said prosecutor to a restaurant for a "pretty good meal" and one of his (prosecutor's) cigars.

At page 775a of the Record:

> "*By the Prosecutor*:
>
> Q. And you had a pretty good meal, did you not? A. I think so.
>
> Q. What did you eat? A. I had fried lobster tails.
>
> Q. *You had fried lobster tails and you smoked one of my cigars, is that right?* A. Yes." (Emphasis ours.)

It is ironic to note and the record so discloses, that for twenty (20) hours (up to this point) the petitioner was starved, with little food, no sleep, no rest and suffered other hardships and indignities. The above makes one wonder was this a "reward" for the "confession" or was it treatment usually accorded a "murderer" in a brutal slaying!

Or with the confession ("death warrant") tucked "safely" under his belt, did the prosecutor, assume the guise of the "executioner", rendering the "condemned man" his *last meal?* Although the record does not disclose it, we understand that this "feast" was in the form of a "Roman Holiday", resplendent with the presence of the Press.

Certainly, this strange behavior and attitude of the prosecutor is damning indeed and comes within the practices condemned by this Honorable Court wherein the police and prosecutor, not by old-fashioned third degree, but by trickery, cajoling, undue influence and extending false sympathy and confidence, gain "confessions" of suspects in crime.

This strange behavior and attitude on the part of the prosecutor becomes even more obnoxious and to be condemned as a practice in *a capital crime of murder,* with the extreme penalty of death in the balance of Justice.

The said "admissions" (before the alleged "confession") were allegedly first made, not to the police, but to *two detectives assigned to the prosecutor's office,* after all-night and through-the-night continuous interrogation by the police (at 10:00 A. M. morning of March 5).

And strangely indeed, the petitioner supposedly and suddenly "broke out crying" after he was merely asked the question:

"What did the girl do to you?" (p. 519a)

He said: "She hit me."

I asked him the question, "where did she hit you?"

He answered, "in the face"; and as he said that "he broke out crying."

"There was a period of time about two or three minutes and he asked for a drink of water and a cigarette. We gave him a drink of water and a cigarette and he said at that

time that the would like to speak to a priest. He asked for a certain priest that he knew in Don Bosco High School.

"When he seemed a little more composed he told us, etc." (p. 519a)

Then continues the recitation about meeting the girl, etc. (*supra*).

Although he is supposed to have asked to see a priest, it dosen't appear from the record that he even waited to see the priest, but, almost immediately (lapse of 23 minutes) he made these "incriminating admissions" about being with the deceased the night of the crime at the scene of the crime (sand-pit) and hitting her with his first (p. 519a).

The alleged "admission" to the prosecutor's office strangely stops at that point.

We next hear of a confession (S-84) to the prosecutor almost three hours later, wherein the petitioner "confesses" that he "did it" (Ex. S-84).

In the intervening period, besides a priest, the petitioner was supposed to have seen *three* (3) *doctors*, called by the prosecutor (p. 773a).

The petitioner, subsequently and at the trial, recanted the "confession" (S-84 in evidence), and stated he "made up" and "lied" in the statement; and also he lied to the said three doctors (p. 774a).

It is strange, indeed, that this prosecutor would call a *priest and three doctors* to see this petitioner *but not one lawyer or friend or relative*. We understand that even the petitioner's wife, who was standing by to call a lawyer, was kept "at bay" and not permitted to see her husband or offer any aid including legal counsel.

This was a "one-man show" (the prosecutor's) until the "drama was played out" (*infra*).

"What is true of the trial is true of the preparation for trial and the period commencing with the arrest of the accused, no matter how well educated and how well trained in the law an accused may be. He is sorely in need of legal advice once he is arrested for an offense that may exact his life. The innocent as well as the guilty may be caught in a web of circumstantial evidence that is difficult to break. A man may be guilty of indiscretions but not of a crime."

The need of a lawyer in a pre-trial investigation, if the constitutional rights of the accused are to be observed, was so upheld by Mr. Justice Black, who added:

> "The presence of legal counsel or any person who is not an executive officer bent on enforcing the law provided still another protection to the witness. Behind closed doors he can be coerced, tricked or confused by officers into making statements which may be untrue or hide the truth by creating misleading impressions. While the witness is in custody of the interrogators, he is subject to their controlled will. Nothing would be better calculated to prevent misuse of official power in dealing with a witness or suspect than scrutiny of his lawyer or friends or even disinterested by-standers."

"The demands of our civilization expressed in the due process clause require the accused who warrants a counsel to have one at any time after the moment of arrest" (*In re Groban*, 352 U. S. 330).

As this Honorable Court observed in the said *Spano* case (*supra*):

> "The drama was now played out, with the final admissions obtained—"

As here, the "final admissions", were obtained the afternoon of March 6, almost twenty (20) hours after the drama began, the night of March 5, when petitioner was taken from his bed in his trailer home (from his wife and child), stripped of his clothing, photographed, held incommunicado, without counsel, without arraignment, etc.

In *Mallory* v. *U. S.* (354 U. S. 449), Mr. Justice Frankfurter, speaking for the court, held:

> "An arrested person may be 'booked' by the police, but he is not to be taken to police headquarters in order to carry out a process of inquiry that lends itself, even if not so designed, to eliciting damaging statements to support the arrest and ultimately his guilt.
>
> The requirement that the arraignment be 'without unnecessary delay' is a compendious restatement without substitute change of several prior specific Federal Statutory provisions. Nearly all states have similar enactments." (As Rule 5(a) of the Federal Rules of Criminal Procedure)

The New Jersey Revised Statutes so provide (Rule 3:2-3 of the Rules of Criminal Procedure):

> "Appearance. An officer making an arrest under a warrant issued upon a complaint shall take the arrested person, without unnecessary delay, before the court or magistrate named in the warrant. A person making an arrest without a warrant shall take the arrested person, without unnecessary delay, before the nearest available magistrate and a complaint shall be filed forthwith and a warrant issued thereon. A preliminary hearing before the magistrate shall be held forthwith.
>
> Preliminary Hearing. The magistrate shall inform the defendant of the complaint against him, of his right to retain counsel or, if indigent, of the privilege of having counsel assigned, and of his right to have a preliminary examination. The magistrate shall allow the defendant reasonable time and opportunity to consult counsel. He shall also inform the defendant of his right to make a statement not under oath as to the charge against him, that he is not required to make such a statement and that any statement made by him may be used against him. If the offense charged may be tried by the magistrate upon waiver of indictment and trial by jury, the magistrate shall so inform the defendant. All waiv-

ers of indictment and trial by jury shall be in writing, signed by the defendant, and shall be filed and entered on the docket."

This Honorable Court further held in the *Mallory* case, *strikingly parallel to the instant case*:

"The circumstances of this case preclude a holding that arraignment was without 'unnecessary delay'. Petitioner was arrested in the early afternoon and was detained at headquarters within the vicinity of numerous committing magistrates, even though the police had ample evidence from other sources than the petitioner for regarding the petitioner as a chief suspect. They first questioned him for approximately ½ hour. When this inquiry of a 19 year-old lad of limited intelligence produced no confession, the police asked him to submit to a lie detector test. He was not told of his right to counsel or to a preliminary examination before a Magistrate, nor was he warned that he might keep silent, and that any statements made by him may be used against him.'

Not only had he confessed, when any judicial caution had lost its purpose, when the police arraigned him.

You cannot sanction this extended delay, resulting in confession without subordinating the general rule of prompt arraignment to the discretion of arresting officers in finding exceptional circumstances for its disregard. In every case, when the police resort to interrogation of a person and secure a confession, they may well claim that they were merely trying to check on the information given by him against such a claim and the evil potentialities of the practice for which it is urged stands Rule 5A as a barrier (note—Rule 5A of the Federal Rules of Criminal Procedure is almost identical with the New Jersey revised statutes as to prompt arraignment without unnecessary delay, etc.).

Nor is there any escape from the constraint laid to the police by that rule in the two suspects in-

> volved in the same crime. Presumably, whenever the police arrest, they arrest on 'probable cause.' It is not the function of the police to arrest as it were, at large, and to use an interrogating process to determine when they should be charged before a committing magistrate on 'probable cause.'
>
> Duty enjoined upon arresting officers to arraign without 'unnecessary delay' indicates that the command does not call for mechanical or autocratic obedience. Circumstances may justify a brief delay between arrest and arraignment, as, for instance, where the story volunteered by the accused is susceptible to quick verification through third parties. *But the delay must not be of a nature to give opportunity for the extraction of a confession.*" (See also McNabb v. U. S., 318 U. S. 332)

To prove the "voluntariness", the prosecutor ingeniously "sandwiches in "between the first "admission" to the police and the "confession" to the prosecutor, a priest's visit, supposedly called for by the defendant.

It is inconceivable that the petitioner would ask for a priest and not a lawyer; and the prosecutor's officers readily "obliged".

This is strangely parallel to the *Spano* case, *supra*, when the police used a "childhood friend" police officer "to overcome petitioner's will" (as the Court indicated).

Here, the police used a priest to accomplish their purpose. (Incidentally, "the priest" did not testify at petitioner's trial.)

It may be blasphemous to characterize the priest's alleged visit, as does this Honorable Court of the visit of the "friendly officer" (in the *Spano* case) observed:

> "Petitioner was apparently unaware of John Gay's famous couplet:
>
> "An open foe may prove a curse,
> But a pretended friend is worse."

This Honorable Court concluded there (as it should here):

> "that petitioner's will was 'overborn by official pressure, fatigue and sympathy falsely aroused. The police were not therefore merely trying to solve a crime, or even absolve a suspect — (compare Crooker v. Calif., supra and Cicenia v. Lagay, supra) they were rather concerned primarily with securing a statement from defendant on which they could convict him. The undeviating intent of the officers to extract a confession from petitioner is therefore patent. When such an intent is shown, this Court has held the confession obtained must be examined with the most careful scrutiny, and has reversed a conviction on facts less compelling than these." Malinski v. New York, 324 U. S. 401. Accordingly we hold that petitioner's conviction cannot stand under the 14th amendment" (See Spano (supra)).

**Re: Preliminary Hearing on "Confession"**

Unfortunately, the trial attorney who had admitted to crucial mistakes, particularly as to the "time of death" (App. 58a; p. 179a), has committed a most serious error in failing to conduct a full hearing, as the law requires, on the "voluntariness" of the confession.

The defense called only the defendant in a preliminary hearing for "cursory" testimony, while the people called one witness, a "juror" (member of the current jury panel) (p. 542a); incidentally, this "juror" was strangely present at every stage of the proceedings, including the investigation, interrogation and "confession"!

This "juror" was apparently a *member of the prospective trial jury panel*. Although, not on the trial jury itself, it seems highly improper and prejudicial to a fair and impartial trial, to have such a person directly or indirectly associated in the case, even before it comes to trial. We cannot surmise or speculate the extent that this "juror" mingled and associated with the other members of the

trial jury panel from which this trial jury was chosen and the extent of dissemination of information or intimate and first-hand knowledge of the crime and the petitioner in connection therewith, in advance of the trial. The fact remains, and is of record, that this "juror" was present and participated throughout the investigation (at the scene of the crime and elsewhere), at the interrogation and subsequent confession (Exh. S-84, 542a, p. 528a, p. 516a (see also, App. p. 105a)). However, it did appear at the motion for a new trial, to show prejudgment and prejudice of at least one juror, that a trial juror, sequestered during the trial at a hotel, allegedly told his wife, during the course of the trial, and before the case was submitted to the jury, that "the Smith family 'were lying in their teeth to save the boy'" and "that her husband (the juror) said the boy was guilty and they (the jury) were going to hang him for it."

The record also discloses another strange appearance in this circumstance by the presence of a member of the Grand Jury Panel, at least, at the proceeding in the prosecutor's office prior to the "confession".

By the prosecutor (of Capt. DeMarco of the prosecutor's office staff) at page 484a:

> "Q. Was there anybody in the office during the morning that was not connected with the Prosecutor's office? A. Yes, sir, there was a member of the —whether it was the current Grand Jury I don't know—but there was a member of the Grand Jury staff."

This apparent fact (*supra*) was not further questioned, explained or controverted. (See also Pt. II as to "denial of fair and impartial trial".)

The defendant testified briefly, that he was taken into custody 11:30 P. M. the night of March 5 (p. 539a) and that from then until the statement was taken, he had not slept; that during the night and up until his confession, the jury

afternoon, "in excess of a dozen" police or prosecutor's officials had continually questioned him (p. 540a).

That he was questioned indoors and outdoors, through a freezing cold night, scantily clothed in a shirt (prosecutor let him "borrow" an overcoat) (p. 541a.)

That he was taken to the medical examiner's office for a physical examination the next morning and that previously, he was at a police captain's house.

That he was "shivering cold" and he had previously been ill (p. 544a) for four days previous and that for a period of twenty-four hours, he had eaten but 2 eggs and had 2 cups of coffee, all told (p. 542a).

The prosecutor asked no questions on cross-examination and called but one witness in this "preliminary examination."

This witness apparently aided the defense, when he testified:

*By the prosecutor:*

> "Q. Was he asked whether or not he would give a voluntary statement? A. He was asked.
> Q. What did he say? A. He said "Let me think."
> Q. And after he said "let me think", what did he say? A. He said "let's put it that way".
> Q. And was he asked whether or not he would give a statement under oath? A. Yes.
> Q. What did he say? A. That I don't recall." (p. 544a)

This bit of testimony seems to throw serious doubt upon the so-called "voluntary" aspect of the defendant's statement. This "juror" seems to dispute the testimony of the prosecutor's officers as to the so-called "voluntary" aspect of the statement.

Although the prosecutor did not call the police officers as witnesses in the brief preliminary hearing concerning

the voluntariness of the confession, he seemed to anticipate the defense and abortively attempted to bolster the "voluntariness" of the confession by inquiring of the police officers, in advance, in their direct testimony whether the confession was "voluntary". Of course, this was but a conclusion and an opinion ill-placed in the record of the case.

**Re: The Furtive and Unlawful Visit by the Prosecutor to Gain "Acknowledgment" of Confession**

*Heaping evil upon evil*, the prosecutor's emissary stealthily (and unknown to defendant's then recently retained counsel and of record) "stole" into the prison, to prevail upon petitioner to sign the so-called "confession" but upon his refusal tricked and cajoled him into "acknowledging" its accuracy, which abortively served its purpose. (p. 520a).

It is most significant to note that under New Jersey law, where the defendant does not sign a confession, he must aver to the accuracy or correctness of a question and answer statement, to be admissible in evidence as a confession (*infra*).

If it were not for this unauthorized and highly improper visit by the prosecutor's officer to petitioner at the prison, *after arraignment and with counsel representing him*, five (5) *days after his arraignment*, the foundation for the admission of the confession could not have been accomplished. (Also, *after defendant's indictment of March 8th.*)

The prosecutor's detective acting for the prosecutor discloses (p. 520a of the Record) that after identifying (Ex. S-84) the said confession, he testified as follows: (detective attached to the prosecutor's office)

(p. 521a)

*By the prosecutor:*

"Q. *On March 11th*, did you take that statement and give it to Smith? A. I took this statement (S-

84) and some copies of the statement over to the jail at about 10 o'clock in the morning of March 11th and I asked Smith to read it.

Q. Did Smith read it? A. He did read it, sir.

Q. How long did it take to read it? A. About 35 minutes.

Q. And subsequently to having read it, what did he say, if anything? A. He said he would not sign the statement. I asked him why and he said that his lawyer told him not to. I asked him if the statement was accurate and he said 'yes, it is accurate'. He commented upon how accurate it was and it was amazing that the court stenographer could take down with such accuracy such a statement.

Q. What time did the interview or at least the conversation together with the reading of the statement take or when did it terminate? A. It terminated at 11 o'clock A. M."

On cross-examination, (p. 521a of defense counsel)

"Q: Who was his lawyer then? A. I think Mr. Gandielle.

Q. I was not his lawyer, was I? A. I don't think so.

Mr. Selzer: No further questions."

It is enlightening to note, that the trial attorney was more concerned with "his status" than that of the defendant: that he was not the lawyer who advised the defendant against signing same. Apparently, missing a most serious point in the case, that this unauthorized, improper and unlawful visit (after arraignment and representation by counsel) *and tricking the petitioner into "acknowledging" the accuracy of the statement was as damaging as the unlawful taking of the original confession.*

It is also significant to note that the prosecutor's representative was fully aware, at that time, that the defendant was then represented by counsel and although he was told by petitioner that his lawyer advised him not to sign any statements, the prosecutor's officer persisted and tricked

and cajoled him into "just reading it", that he obtained an acknowledgment as to its accuracy or, in effect, its "truthfullness" (p. 520a). Without this averment by petitioner as to its accuracy—after his refusing to sign same—*the sole evidence—the confession* Ex. S-84, could not have concededly been admitted into evidence and the prosecutor's (People's) case would have indeed collapsed! The prosecutor was fully aware and cognizant of this vital link. On appeal, the prosecutor in seeking to uphold this "confession", argued:

> "The law is clear that a statement made by a defendant need not be signed by him to render the same admissible. All that is required is that the statement be read over to or by *the accused* and that it be signed or *otherwise admitted by him to be correct*".

> NOTE: The prosecutor here blandly argues that the statement (confession) was made by "a defendant" or "the accused"!

(See also ruling by the Court on admission into evidence of the confession—Exhibit S-84 (p. 549a):

> "and a confession, though unsigned, if acknowledged, read and approved by the confessor, is admissible in evidence as an entity".

In *Asheraft* v. *Tennessee* (*supra*): "The uncontradicted evidence (inter alia) that Asheraft had been held incommunicado for 36 hours, during which time without sleep or rest he had been interrogated by relays of officers and investigators show a situation inherently coercive." (Solely and alone, on the basis of this confession, he had been convicted, as here).

State and Federal Courts' text book writers, legal commentators and government commissions consistently have applied the name "inquisition" to prolonged examinations of suspect's conduct, as was the examination of Asheraft.

*Chambers v. Florida*, 309 U. S. 227;
*Brain v. U. S.* (*supra*).

Mr. Justice Black, speaking for the majority of the Court stated:

> "It is inconceivable that any Court of Justice in the land, conducted as our Courts are, open to the public, would permit prosecutors serving in relays to keep a defendant witness under continuous cross-examination for 36 hours without rest or sleep in an effort to extract a 'voluntary' confession, nor can we consistently, with constitutional due process of law, hold voluntary a confession where prosecutors do the same thing away from the restraining influences of a public trial in an open Court."

In this connection, it is highly significant to note that all during said lengthy and unreasonable detention of petitioner, for almost twenty (20) hours, there was at all times available a magistrate before whom Smith could have been arraigned (as so noted in the *Mallory* case (*supra*)).

It was only after the unlawful detention and restraint that the petitioner was brought to the prosecutor's office *without being advised* (as above noted) "*of his right to counsel or to a preliminary examination before a magistrate or that he might be kept silent and that any statement made by him might be used against him*", that the so-called "confession" was obtained.

Also, it should be mentioned that consistent with the petitioner's protests of innocence, he thereafter voluntarily submitted to a "truth-serum" test conducted under the supervision of the State authorities and the Court, *but* the records of said tests and a tape-recording of same were never filed or made known to the petitioner or his trial counsel although repeated demands to this date, had been made for same. The said demands were fortified by a recent motion on June 12, 1959, in the Bergen County Court, New Jersey, which was summarily denied.

Of course, present counsel is cognizant of the fact that this "truth-serum" examination would not be "evidentiary" but nevertheless would be "in the interest of justice" and significant and fortifying as to the defendant's claims and protests of innocence.

* * *

*For the sake of brevity, in this petition, we will* briefly, the remaining points relied upon.

* * *

## II

**As to the denial of a fair and impartial trial, guaranteed by the Bill of Rights and the XIV Amendment to the United States Constitution.**

It is highly significant to note *that the Trial Judge's charge was the most vicious and brutal summary of prejudice and hostility imaginable and not within counsel's scope of knowledge and experience of over twenty years at the Criminal Bar* and together with an accumulation of other enumerated prejudicial errors and failures was a departure from the accepted and usual course of judicial proceedings and in violation of the XIVth Amendment to the United States Constitution.

*This Court's attention* is most respectfully called to the Judge's charge, which appears in Volume III (pp. 944a-968a) wherein the Trial Judge, himself a father with a fifteen year old girl, overcome emotionally during the trial (calling for his own recesses to compose himself) finally delivered a charge to the jury what amounted to a scathing denunciation in the case and erroneous and misleading enunciation and theory of the evidence in the case, *in reviewing the People's case; and not saying one word about the defense*, as to "voluntariness" of the confession, degree of "temporary insanity" or whether the alleged crime could have been committed by some other person, as petitioner

contended. Over and over again the Trial Judge (and unfortunately the cold print cannot show such emotion) spoke of the "braining", "decerebration", "skull-crushing" "blood-stained area", "blood-drenched rocks", "blood-marked baseball bat", "death-dealing blows", "body torn, crushed, mutilated, exposed", "face bashed", "brains separated from the head", etc. in the most gruesome and word-sordid portrayal manner imaginable, far from what we would expect from a fair and impartial Trial Judge, summarizing fairly and impartially both sides of the case and the applicable law for the State and the defense:

23 Corpus Juris, Secundum, Sec. 960:

> "The object of criminal trial is to mete out justice. Every accused personally is entitled to a fair and impartial trial and the presiding judge must so control the trial as to preserve this right as well as all other rights of the accused and the prosecution.
>
> Under constitutional or statutory guarantees thereon, every person accused of a crime is entitled to a fair and impartial trial in which the legal rights of such accused person are safeguarded, protected and respected; that is a trial on the facts in accordance with the law and the evidence, with applicability to defend before an unbiased tribunal in an atmosphere of judicial calm and free from harmful error and any extraneous influence that might be to his prejudice.
>
> This right of a fair trial exists and must be upheld regardless of accused's actual or apparent guilt or the court's belief therein; regardless of the nature of the crime, the existence of public sentiment and regard thereto.
>
> The trial court must uphold and enforce accused's fundamental rights."

The said Trial Judge, in his charge strongly supported the theory of the People's case as a "*sex-killing*" (but not supported by the evidence) that "the defendant con-

tended with her—struggled with her"; "as he pursued the victim who sought relief from his clutches", etc. *but* where was the jury when the judge remarked to the prosecutor, as follows (at p. 976a):

The prosecutor excepted to the Court's charge as follows (but this debate in the absence of the jury, which had already retired for deliberation):

*By the Prosecutor:*

"Mr. Calissi: Yes. If the Court please, the State excepts to that portion of the charge wherein the Court failed to explain to the jury the felony murder, that is, that part of 2A:113-1 which says, 'If any person, in commiting or attempting to commit arson, burglary, kidnapping, rape, robbery sodomy or any unlawful act against the peace of this state,' and so forth.

The State contends that there was sufficient evidence in this particular case and I am referring to the biting of the breast, the condition of the girl's clothing, to indicate that there was evidence at least to go to the jury of a felony murder.

The Court: Under what felony?

Mr. Calissi: Rape.

The Court: Rape?

Mr. Calissi: Attempted.

The Court: With your testimony that the girl from the waist down was virginal, clean and pure, her pants were spotless, her belt was untouched?

Mr. Calissi: Yes.

The Court: There wasn't sufficient evidence, or any evidence on which I could let this go to the jury on a felony rape.

Mr. Calissi: All right that is the Court's contention. I believe it is my duty as Prosecutor to contend for the State that attempted rape is sufficient for felony murder.

The Court: Let me say I gave that consideration and say for the record I found no evidence to support an attempted rape under the State's evidence and

therefore, sent it to (1610) the jury solely on an act the consequences of which may be bloodshed" (pp. 975a-976a).

The prosecutor and the Judge apparently blandly "*abandoned*" their theories of a "sex-murder"; *but all this not in the presence of the jury and the jury not brought back for further instruction.* (The jury already retired, as above noted but with prejudicial and inflammatory words of the prosecutor and the judge concerning a "sex-murder" etc. ringing in their ears.)

All this colloquy, *after* the jury was retired for deliberation *and not* recalled for further instruction!

The Trial Court further added to the defendant's unlawful conviction and deprivation of his fundamental rights by failing to submit to the trial jury all possible degrees of homicide (under a common-law indictment) including "Manslaughter". The jury was but given a choice of Murder in the first or second degrees.

Furthermore, two large blood-smeared rocks (12 and 25 lbs.) were introduced into evidence at petitioner's trial by the prosecution, although concededly not connected with the defendant and also concededly (by the State's own expert) not "handled" previously by any person, nowise this defendant. That this was improperly received and highly prejudicial and inflammatory needs no further note (p. 907a).

*The Court's charge and prosecutor's summation were highly prejudicial and inflammatory*, prompting a verdict not based on temperate discussion and clear convictions, but the direct product of bias and prejudice and "judicial coercion".

For example, the prosecutor told this jury (without objection) "*The dirtiest and foulest trick that was ever pulled by a defendant was pulled when it named his friend as the person to whom we should point the finger and say that he murdered Victoria Zielinski*". (Italics ours.)

Although sympathy and prejudice have no place in a criminal trial, especially a capital case, the prosecutor went on:

> "He talked about sympathy. Sympathy should go to Hommell and his family. What a disgraceful thing to have to cope with, a friend pointing his finger at you and saying to you, 'You committed this crime' ".

The jury was, no doubt, further influenced by highly prejudicial and inflammatory and improperly received color-slides and much enlarged colored photographs (16 x 20) of the scene of the crime and viewing the gruesome picturization of injuries and wounds to the deceased (skull crushed), depicting the murder scene and the body with a flaming blood-red color, although at least twelve hours had elapsed from "the time of death" and the blood had, no doubt, coagulated and changed to a more subdued color.

These enlarged color photographs goringly depicted the crushed, decerebrated skull with oozing blood; with the separated brains lying on the ground, etc. *These were objected to as not evidential and highly prejudicial* (p 319a). (These gruesome color enlargements were not reproduced in the appeal record due to the prohibitive costs).

Any logical relevance of such exhibits was overwhelmed by their inherently prejudicial qualities, and should have not been admitted.

These most gruesome and blood-curdling photographs were continuously on display before the jury throughout the entire trial.

At the trial, although in the prosecutor's possession, the death certificate fixing the "time of death" at about "10 to 11 P. M." was never introduced; the time element was a vital factor in the case and an essential element of the crime since *the defendant was concededly not at the alleged scene of the crime aft[illegible] 9-9:30 P. M.* (according to

the so-called "confession" and his testimony at the trial not refuted) *said death was concededly* instantaneous.

Facts pertaining to the prime suspect, one Don Hommell concerning his claimed "alibi" and the laboratory examination of his clothing worn the night of the crime, etc. were undoubtedly in the prosecutor possession but never presented during the trial or made available to the defense.

The autopsy report now appears to conflict with the trial testimony as to "the cause of death".

The autopsy report (not produced at the trial) attributed the cause of death to injuries due to a rock or stone conflicts with the theory of the prosecutor's case that the deceased met her death at the hands of a baseball bat; and the blood-smeared rocks also introduced into evidence against the petitioner, were concededly *not* handled by any person (p. 607a).

## III

**As to the petitioner having had inadequate defense representation and presentation (Point III) (to be read together with Point II).**

Although present counsel is reluctant to criticize the "inadequacy" of the trial attorney, it is of such serious import that such scruples must be cast aside in this capital case and this Honorable Court must be made cognizant of the serious inadequacy of the presentation of defense herein and the inadequate representation of petitioner, which should not be visited upon and to the prejudice of the petitioner.

*The following serious errors and failures of defense were committed:*

1. Failure to move for a change of venue from the said county which was highly inflamed and prejudiced by this killing.

2. Although counsel objected to the "voluntariness" of the so-called "confession" he failed to request and the Court failed to conduct a required full hearing as to the facts and circumstances surrounding the obtaining of said alleged "confession".

3. That if this was to be construed as a "confession" wherein the petitioner claimed his mind "went blank" and "somebody pulled the switch", etc., then a defense of a *degree of "temporary insanity"* should have been asserted and presented to the Court and Jury. *There was utter failure of this crucial defense.*

4. The petitioner in his so-called "confession" "couldn't account" or even "remember" essential facts so necessary to prove "premeditated and deliberate murder" (See Exh. S-84).

5. Defendant-petitioner testified in his own behalf at the trial and denied the so-called "confession" and implicated another as a "prime suspect" in the case; but these conflicts were not reconciled.

6. Although the "confession" implied a degree of guilt less than murder possibly manslaughter (a crime without motive and or intent to kill), the case was presented to the Jury solely in the degrees of Murder first and second degrees, *and no suggestion of any degree of manslaughter, as a lesser crime.*

7. Although the District Attorney in his opening and throughout the theme of his entire people's case suggested a "sex-murder", a "felony-murder" (rape or attempted rape) *there was no evidence of same* nor could same be deduced from the petitioner's alleged confession, the only evidence in the people's case (p. 976a).

The Court ruled out felony-murder (rape) *but the Jury had already retired,* with this prejudiced misconception ringing in their ears.

Trial counsel and the Court utterly failed to have the jury recalled for further instructions on this most crucial and vital point in the case.

The exceptions to the jury charge were made in the absence of the jury which was intended to rectify error of the Trial Judge's charge (pp. 969a-976a).

Although trial counsel did not particularly so except, he nevertheless made a general exception to the entire Court's charge (p. 969a).

8. A serious question arose and still persists as to the "time of death" since the Medical Examiner fixed the time of death as of 12 Midnight, give or take an hour and that the death certificate fixed same "about 10 to 11 P.M." that night. (Subsequently, after trial, it was learned that the death certificate was available and so fixed the time of death). (*This important death certificate was never produced as evidence at the trial*). It is submitted that petitioner was nowhere near the scene of the crime's so-called "sand-pit" after 9 P. M., although death was concededly instantaneous and immediate.

Trial counsel, to this day, admits his serious and grievous error in that he failed to inquire of the Medical Examiner if the time of death could have been as early as 9:00 or 9:30 P. M. (App. pp. 40a, 41a).

At the motion for the new trial said trial counsel testified and practically "broke down" to admitting this serious error and failure and or neglect which could have been the turning point in the case and possibly resulted in another jury verdict (App. pp. 179a-182a).

At the motion for a new trial, the trial attorney made a most damaging admission concerning his failure and neglect to ask a crucial question of the medical examiner as to the time of death.

The trial attorney plagued by this failure and neglect *after the trial* and before a motion for a new trial, based upon newly discovered evidence, testified (App. p. 37a):

> "The Witness: I asked Dr. Gilady (medical examiner) whether or not he could say, in his opinion, that Victoria Z. had been killed as early as 9 o'clock on the night of March 4th. Dr. Gilady said he would not discuss the matter with me at all unless and until either the Court or the prosecutor told him he could do so—"

and, on re-cross examination by Mr. Calissi (prosecutor at page 39a):

> "Mr. Selser: Did you or did you not cross examine Dr. Gilady during the course of the trial?
> A. Yes sir, I did.
> Q. Is there any reason at all why you could not have asked him the exact question during the course of the trial that you asked him two weeks ago? A. There is but one reason, Mr. Calissi, I didn't think to ask the exact question.
> Q. So you had— A. I thought the record clearly indicated that this girl could not have been killed earlier than 11 o'clock. I thought that was in the testimony—"

*Redirect examination by Mr. White (a defense attorney):*

> "Mr. Selser: You were asked by the prosecutor if you had any particular reason for not asking that question and you said yes. Was there any particular reason?
>
> Mr Calissi: For what?
>
> Mr. White: Not asking the question of Dr Gilady with respect to whether or not the crime was committed about 9 o'clock.
>
> A. The reason is that *I am not smart enough to have thought of it.*" (Emphasis ours.)

At the conclusion of the hearing on the motion for the new trial, App. p. 179a (by the trial attorney):

> "Mr. Selser: I am grateful to your Honor for giving me the right to address myself to your Honor on the subject of Dr. Gilady's testimony which was a part of my petition for a new trial.
>
> Your Honor of course knows that under subpoena I cannot compel a physician to give opinion testimony.
>
> Your Honor recalls very well that Dr. Gilady testified that the girl was dead in his judgment twelve hours, give or take an hour.
>
> His autopsy was done between 12:30 and 1:00 o'clock of the afternoon of the 5th of March. That, if his testimony were left right there, would have placed the time of death twelve hours before 12:30 o'clock which would have made it 12:30 o'clock in the morning of the 5th. Give or take an hour would have moved it backward to 11:30 o'clock on the 4th. This was the State's testimony and had I let it be there without cross-examination, I would assume that there could have been no verdict against Smith because there was no other testimony (270) anywhere in the record fixing time of death.
>
> Under cross-examination I pursued the subject with Dr. Gilady and he said that she might have died earlier than 11:00 o'clock but at no time was he asked how much earlier than 11:00 o'clock and when the State on redirect went after Dr. Gilady trying to fix an earlier period of time, Dr. Gilady finally summed up his testimony and said, 'It is my opinion she was dead twelve hours, give or take an hour.'
>
> I have set forth in my testimony before the Court and in the petition that I asked Dr. Gilady the question point-blank as to whether or not this girl could have been killed as early as 9:30 o'clock in the evening of the 4th of March. That in my judgment is the latest Smith could have been in the area where her body was found. Dr. Gilady said he cannot and would not discuss this with me unless and until he

had an order of the Court or a directive from the prosecutor because he did this as County Medical Examiner and without this he would not discuss the subject with me.

Now, it is of tremendous importance in my (271) judgment and the Supreme Court apparently went along with the thought that your Honor expressed that this was an attack upon the credibility of the State's proofs.

It is not so, sir, because the State proved conclusively by its evidence that Smith could not have killed this girl unless the death occurred as early as 9:30 because your Honor will remember that it was a few minutes after 9:30 that he picked up Gilroy at Gilroy's home and this witness for the State testified that he was there after continuously being in the presence of Smith until he delivered Smith shortly after 10:00 o'clock at the home of the mother-in-law in Ridgewood, and there is ample proof that thereafter Smith was continuously in Ridgewood. There is no contradiction of the fact.

Now, sir, this, in my judgment, was of tremendous consequence and leaves in my mind the very sincere thought that there is not proof sufficient to have this boy forfeit his life.

I realize, of course, that there are many circumstances against the boy's defenses (272). There are many circumstances which point to a suspicion but the suspicion, sir, is not enough in the light of the testimony presently before us as to the time of the killing and certainly it should have amply been amplified by the testimony of Dr. Gilady. If Dr. Gilady testified before this Court that she could have died as early as 9:30, then I don't think I should feel so badly about the execution of this boy, but I can't see it, sir. I can't see it. It isn't possible that in this free democratic country the life of a lad could be taken where doubt exist as they must exist in this case.

Now I have heard all kinds of contradictory stories from many, many witnesses, sir. The greater

difficulty that ever existed was in getting people to talk with us, all the way through the preparation of the case, the trial of the case in the proceedings which thereafter occurred. I feel very keenly, sir, that the record in this case as it stands today is not such a record as justifies the destruction of this boy's life. I base it more than anything upon this lack in the time of death, this lack of proof.

(273) I certainly and strongly feel * * * the boy tells me, insists today even in the presence of God, practically, that he did not kill the girl.

The confession, as it was called by your Honor and by the Supreme Court, does not confess it."

## IV

**As to the petitioner's unlawful conviction there was further denial of due process and failure of a submission to the Jury of all possible degrees of homicide.**

The record in the case is replete with confusion as to the indictment, prosecution and submission to the jury as to the degrees of homicide and possible verdicts thereunder.

The prosecutor contended this was a "sex-murder", "felony (rape) murder"; the Court thought otherwise but submitted to the jury only two degrees of murder, "*forgetting*" *entirely* "*Manslaughter*" which could have been deduced and justified from the evidence rather than premeditated and deliberate murder (pp. 976a; 956a).

The crime concededly was not committed by any prearrangement or "design for killing" so vitally necessary in a "Murder" conviction in the first or second degrees.

*The motion for a new trial*: based upon newly discovered evidence claiming alleged "perjury" committed by a "prime suspect", one Don Hommell who had been "involved" and placed at the scene of the crime by the peti-

tioner and thereafter presenting a false "alibi"; and that the jury's verdict was based upon an unlawful and prejudgment of guilt (App. p. 105a).

The petitioner, through counsel, requested at the outset that he be produced and be present at the *hearing* on the motion for new trial, which was denied by the Trial Court Judge.

Certainly where an issue is presented, as to the presence at "the scene of the crime at the time of death", of the petitioner or this "suspect" Hommell (whose alibi was being challenged at this hearing as "false"), then certainly the petitioner should have been present. It must be emphasized *that this "suspect" Don Hommell was present in Court at this hearing* (but not called as a witness).

In *U. S. v. Hayman*, 342 U. S. 205, this Court held:

> "Whether the prisoner should be produced depends upon the issues raised by the particular case. Where, as here, there are substantial issues of fact as to events in which the prisoner participated, the trial court should require his production for a hearing."

As appears from the motion for a new trial held and denied by the said Bergen County Court and upheld on appeal by the State Supreme Court of New Jersey (29 N. J. 561) at least one juror had unlawfully expressed and communicated his prejudged and prejudicial opinion while the trial was in progress and evidence not completed that *"Smith and his witnesses were lying in their teeth"* and *that "they (meaning the jury) were going to hang him"* (App. p. 105a).

A tavern owner, one Herbert Pelzer, who did not testify at the trial, testified at the motion for a new trial that the *said Don Hommell was not in his tavern on the night of the killing on March 4, 1957 (as he claimed) and had approached*

*him on March 5, 1952 to offer a "false alibi" for him* (App. p. 41a).

Trial counsel, at the motion for a new trial, attempted unsuccessfully to correct his own "neglect and failure", by trying to recall the Medical Examiner and to introduce the death certificate (never introduced as evidence at the trial) to fix the *to fix the "time of death" with a degree of certainly so vital in this case* (App. p. 37a).

The petitioner shall at this time, reserve further argument for the sake of brevity and so as not to unduly burden the Honorable Court to a more formal submission upon the Writ of Certiorari herein.

## V

**The petitioner was further denied due process of law by the denial of the Trial Court Judge as requested by defense counsel to produce the defendant-petitioner at the hearing on the motion for the new trial upon newly discovered evidence.**

This point was raised upon appeal in the New Jersey Supreme Court, the denial of the motion for a new trial (29 N. J. 564) the Court there said:

> "Reference is made to Article 1, 10, of the N. J. Constitution and to the Vth and VIth Amendments of the U. S. Constitution in support of the contention. *The precise question has not been dealt with previously in this State* * * *
>
> Defendant's application therefore was addressed to the discretion of the court. *Although it might very well have been received favorably since the case is a capital one.* The record provided no basis for overruling the action taken."

However, this Honorable Court has held:

> "Whether the prisoner was to be prejudiced depends on the issues raised by the particular case where, as here, there are fundamental issues of fact as to events in which the prisoner participated. The trial court should require his production for a hearing."
>
> *U. S.* v. *Hayman* (*supra*) and
> *Chessman* v. *Teets* (Calif.) (decided June 10, 1957)

Here, the issue raised at the hearing required the petitioner's presence since it concerned itself primarily (among other issues) with a "false alibi" presented by a "prime suspect" one Don Hommell implicated by the petitioner as placing him "at the scene of the crime at or about the time of the killing."

As noted (*supra*), this "prime suspect" presented an alibi at the petitioner's trial that he was not near the scene of the crime at or about the time of the crime, but was in a tavern some distance from the scene of the crime. Subsequently, after the trial and at the motion for a new trial, the owner of said bar where Hommell claimed to be, gave the lie to him and testified at the hearing for a new trial that said Hommell was not in his tavern on the night in question and, furthermore, approached him the following day to offer a "false alibi" for him which he refused.

The said bar-owner did not testify at the trial either for the prosecution or the defense but subsequently became conscience-stricken and offered to tell the truth (*supra*).

This highly significant testimony was not refuted by said Hommell although he was present at the said hearing. He did not testify then nor was his trial testimony offered in rebuttal nor with all the petitioner's testimony.

It seems that petitioner's presence should have been required as requested by the defense where, as here, "there was a substantial issue of fact as to an event in which the prisoner participated".

## Conclusion

That in addition to the substantial constitutional questions hereinabove outlined, it is counsel's firm belief that this conviction of Murder in the first degree of the petitioner, to this very day, is surrounded with so much doubt and confusion that this capital case cries out for review and the ends of justice would most certainly be met, if this petitioner would understand and appreciate that the Highest Court in the Land has fully reviewed his "Murder Conviction", which calls for the extreme and irrecallable penalty of death.

**Wherefore, it is respectfully prayed that the petition herein, for writ of certiorari to review the judgment of conviction and sentence of death, be granted.**

Respectfully submitted,

WILLIAM RICHTER,
*Attorney for Petitioner.*

ROBERT W. HICKS,
*of Counsel.*

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No. 264

SUPREME COURT, U.S.
FILED
JUL 31 1959
JAMES R. BROWNING, Clerk

# Supreme Court of New Jersey

DOCKET NO. 9655

STATE OF NEW JERSEY,
*Plaintiff-Respondent,*

*vs.*

EDGAR SMITH, also known as EDGAR H. SMITH,
*Defendant-Appellant.*

Criminal Action
(On Indictment No. S-276-55 for Murder)

On Appeal from Order of the Bergen County Court—Law Division, Denying Defendant's Motion for New Trial

Sat Below:
O'Dea, J.C.C.

## OPINION OF NEW JERSEY SUPREME COURT (FRANCIS, J.)

**[Reported in 29 N. J. 561 (1959)]**

Williams Press Co., 11 Commerce Street, Newark, N. J.—Market 3-8011-12

# Supreme Court of New Jersey

A-108 September Term, 1958

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STATE OF NEW JERSEY,

*Plaintiff-Respondent,*

*vs.*

EDGAR SMITH, also known as EDGAR H. SMITH,

*Defendant-Appellant.*

---

Argued April 7, 1959. Decided May 4, 1959.

MR. WILLIAM C. BRUDNICK, Special Assistant Prosecutor, argued the cause for plaintiff-respondent.

(MR. GUY W. CALISSI, Bergen County Prosecutor, attorney.)

MR. JOHN E. SELSER argued the cause for defendant-appellant.

The opinion of the Court was delivered by

FRANCIS, *J.*

The defendant Smith was convicted of murder in the first degree and was sentenced to death. The conviction was affirmed unanimously by this Court in a comprehensive opinion which concluded with the observation:

> "A reading of the record firmly and impressively convinces the impartial mind of the truth of the charge made against the defendant beyond a reasonable doubt." 27 N. J. 433, 466 (1958).

The execution was scheduled for the week of August 17, 1958. On August 8 defense counsel applied for a new trial primarily upon the ground of newly discovered evidence. After a hearing before the judge who had presided at the trial, the application was denied. This appeal attacks the legal propriety of the denial.

The original 31 page opinion of Justice WACHENFELD sets forth the circumstances of the homicide in detail. For purposes of perspective, however, repetition of certain of the facts which are pertinent to this proceeding seems necessary.

On March 4, 1957, at about 8:35 p.m., the decedent, Victoria Zielinski, 15 years of age, was walking along Wyckoff Avenue, Ramsey, New Jersey. She had visited a friend and was on her way home, more than half a mile away. The defendant Smith, who knew her casually, happened along in a borrowed car and undertook to drive her there. Instead of going directly to her home, he drove to an isolated sand pit in the neighborhood and parked. There, according to his confession, for no apparent reason the young lady said she was going to get out of the car and walk home. She said also that she intended to tell her father that he was "like the rest of the guys". He tried unsuccessfully to prevent her from getting out and when he tried to follow her, she began to yell and slap at him. He then swung at her "as hard as" he "could" with his right hand; "I don't know whether it was a fist or a slap or what." He did not know if he actually struck her. From that point on, things were vague in his mind, i.e., "that's where somebody pulled the switch." He next remembered getting back into the car alone. In the interval of vagueness he did not know whether he had struck at her more than once or whether he did so with an object other than his hand. He had a "feeling of running somewhere" or "chasing somebody". He thought he recollected "running in the sand with my shoe off." On getting back into the car, his right foot was cold; later he became aware that

he had lost his shoe. When he left the sand pit, Victoria's school books and pocketbook were in the car. After proceeding a short distance, he thought he probably threw them into the woods. In accordance with information furnished by him, the police later located them there. On reaching home, he realized that his khaki trousers and socks were bloody. He changed the trousers, went back to the pit with a lantern, and retrieved his right shoe. Later the trousers, socks, and shoes were disposed of in the manner referred to in Justice WACHENFELD's opinion, 27 N. J. at 444-445.

At the trial, Smith testified that he and Miss Zielinski quarreled while they were parked at the sand pit and he told her to get out of the car. She did so and started walking down the road. The events that allegedly occurred thereafter are recited in the earlier opinion as follows:

> "A few moments thereafter, while he was preparing to leave the pit, defendant heard a commotion and saw two figures coming up the road. He quickly got out of the car and his 'bad' ankle, which had been struck by a bowling ball earlier in the day, collapsed under him, his right shoe coming off. Since the identities of the oncoming persons were unknown and it was a lonely spot, he seized the baseball bat from the back seat of the car for protection.
>
> "As the figures approached, he recognized them as Victoria and D. H. Victoria was bleeding from a cut over her ear. Smith asked D. H. what had happened, and the latter replied the girl had fallen on the road. Smith examined the wound and in the process got blood on his hands and trousers. Feeling she should be taken to a doctor, he placed her in the automobile, but D. H. grabbed her and forcibly pulled her out, telling Smith to leave her alone, that he, D. H., would take care of her. Victoria pleaded with Smith for succor, but since D. H. knew her much better than he, Smith decided he should not interfere further and drove off,

leaving his shoe and the baseball bat behind." 27 N. J. at 446-447.

Smith's home was a short distance away. He drove there, washed up, changed his trousers, telephoned Joseph Gilroy, whose car he had been driving, and departed at about 9:10 p.m. to pick Gilroy up. On the way, he revisited the sand pit and retrieved his shoe.

Repetition of the above portion of the facts of the tragedy has been engaged in to point out the time element involved. On the basis of Smith's testimony at the trial, he picked up Miss Zielinski at about 8:35 p.m. (although at one point he said it was about 8:40 or 8:45 p.m., "it could have been later or could have been earlier."). He must have left Miss Zielinski and D.H. at the sand pit before 9 p.m. because after driving home, talking to his wife (who testified he arrived home shortly before 9 p. m.), washing up, changing his trousers and socks, attempting unsuccessfully to start a gasoline heater in the trailer where they lived, and making his telephone call, he left home at about 9:10 p.m. to pick up Gilroy. Thus the import of his allegation at the trial was that D. H. appeared at the sand pit shortly before or around 9 p.m. And the conclusion which the defense sought to have the jury reach was that D. H. committed the murder.

But impressive evidence, accepted by the jury at the trial as credible, showed that D.H. was at work in the Wyckoff Pharmacy from 6 until shortly after 9 on the evening in question. According to the pharmacist, at about 8:35 or 8:40 p.m., he was sent in the employer's station wagon to pick up some merchandise at another drug store in Ridgewood, New Jersey, normally an 18 to 20 minute round trip according to a police officer who timed it. D.H. returned to his employer's place of business at about 9 p.m., or shortly before, with the package he had been sent for and did not leave again until a short time after 9 p.m.

D. H. testified that on quitting work he drove his own car to Pelzer's Tavern in Mahwah, entering there at approximately 9:20. (On the way at about 9:05 or 9:10 he passed Myrna Zielinski, one of Victoria's sisters. Everyone concedes this fact.) After a stay there of about 20 minutes, he left and went to Pellington's milk bar on Route 17 in Ramsey. He reached that place at about 10 p.m. Corroboration was furnished by witnesses who saw him at both places at the times indicated. Thereafter, he drove to his home, also in Ramsey, arriving there around 10:15 or 10:30. He was in bed at 11 p.m.

I

The new trial application consisted principally of an effort to discredit D. H.'s testimony at the trial that he had been in Pelzer's Tavern on the night of the killing and was home in bed at 11 p.m. that night.

Attached to the moving papers was an unsworn statement of Herbert Pelzer, owner of the tavern, dated July 3, 1958, in which he stated:

> "That on the evening of March 4, 1957, I was operating my tavern in the normal pursuit of business. That on that particular night, March 4th, Charles Rockefeller known as 'Rocky' was in my establishment at 7:30 p.m. when his father came to pick him up and they both went out of my tavern. I did not see Charles Rockefeller again that night. Also, a man named [D. H.] was not in my place of business on March 4th at any time. However, on Tuesday, March 5th and thereafter, [D. H.] was constantly after me to say that he and Rockefeller were in my tavern from 9:30 p.m. and on during the evening of March 4th. The other men who were in my tavern that evening were Judge Young, Steve Wastog known as 'Lover', Tony Mihok and they all know neither one of the men named, that is [D. H.] or Rockefeller, were in my place of business on the evening of March 4, 1957. * * *."

A second statement, attached and also unsworn, was signed by George W. Self, a United States Army private, who married Mary Faye Zielinski, sister of the decedent, subsequent to the homicide. The paper is dated May 30, 1957, and asserts that on the fatal night he was out with Mary. They returned to her home about 10:15 or 10:30 and learned of Victoria's absence. They went out to look for her and stopped at a place known as Robby's Corral to inquire if anyone had seen her. Self went in and made inquiry of the owner and "one or two" other men who were there. Mary remained in the car. He was told that they had not seen her. While driving around town (he said) "[W]e saw [D. H.] two or three times, in the evening in his two-toned green Ford. One time in the heart of Ramsey and one time on Franklin Turnpike going toward Route 17." He said also that he saw H. "just a little before 10:00 p.m. as we were going to Mary's home the first time before we learned she was missing." Neither Self nor Mary Zielinski had been called as a witness at the trial.

At the hearing on the effort to obtain a new trial, Pelzer was called to testify. The procedure followed on his examination was most unusual. On direct examination, the signed statement mentioned above was shown to him. He conceded he signed it and that with one exception the contents were true. Then it was marked as an exhibit. This course was improper. The witness was in court; the affidavit was hearsay. The best and primary evidence was his oral testimony. Whatever he had to offer in the way of alleged newly discovered evidence should have been introduced in the conventional manner. It would have been proper for the prosecutor to utilize the statement on cross examination if the oral testimony deviated therefrom, and in appropriate circumstances it would have been permissible for the witness to use it to refresh his recollection. Of course, the method of handling the matter was not prejudicial to the defendant; it was advantageous to him. And

in view of the seriousness of the case, we accept the record as presented.

After the statement had been introduced, Pelzer (who had a criminal record for aiding and abetting bookmaking) testified that D. H. was not in his place of business between 7:30 p.m. on March 4, and 2 a.m. on March 5, 1957. He said also that Judge Young, Tony Mihok and Steve Wastog were present that evening.

On cross examination it developed that about a week or 10 days after the homicide he had given a voluntary statement to representatives of the Prosecutor's Office that D. H. was in the tavern on the night of March 4. Further, he admitted that before his statement was given to the State, an investigator for the defendant, one A. D. Nicol, had interviewed him. He told Nicol that D. H. was in his bar on March 4 from "9:30 on." Prior to the July 3, 1958 statement, he never informed Mr. Selser or Nicol that D. H. was not there that day.

On being asked why he told the Prosecutor that D. H. was in the tavern, he said: "It came back to me"—meaning "That's the statement I made to Mr. Nicol." At this juncture, the Court repeated the question as to why he had so advised the Prosecutor. He said: "I wasn't sure." He came to the conclusion that D. H. had not been in his tavern "a few months later" but this was after the trial was over. The record contains no explanation as to when or how this new conclusion came to the attention of the defense.

Pelzer admitted that he erred when he said in his statement of July 3, 1958, that D. H. asked him on March 5, 1957 to say that Charles Rockefeller also was in the tavern on the previous evening. Moreover, he asserted therein, and on his direct examination swore that it was true, that Rockefeller left the place at 7:30 p.m. on March 4 when his father came to pick him up and "they both went out of my tavern". But on cross examination he said he saw Rockefeller leave alone and assumed that someone picked him up. The State produced Rockefeller's father, who testified that

on March 4, 1957, he was at work as a chef in the Saddle Inn, Route 17, Upper Saddle River, from 4 p.m. until midnight and that at midnight his son picked him up there to drive him home.

The July 3, 1958 statement recites that on March 5, 1957, and thereafter D. H. "was constantly after me to say that he and Rockefeller were in my tavern from 9:30 p.m. and on during the evening of March 4th." His testimony limited the alleged request to the evening of March 5 when it was said to have occurred two or three times. And it was couched in somewhat different terms while he was on the witness stand; it was "[r]emember, I was in here last night from 9:30." Nothing more was said. Pelzer made no answer; he "walked up the other end of the bar."

At first Pelzer testified that he did not recollect who was in the tavern on March 5 when D. H. allegedly spoke to him. Then he recalled on being reminded by the Prosecutor that the place was crowded that night; reporters, detectives and others were there. The reason for the lapse was that his "memory goes once in a while." But he said the crowd stayed at one end of the bar and D. H. called him to the other end and whispered the request on two or three occasions. Later, he qualified the location of the crowd by placing them "from the middle up" and then he thought there "might have been one or two people" from the middle down to where D. H. called him and engaged in the whisper. At no time did he answer or make any comment; he simply walked away.

During the course of the murder trial, Pelzer was in court for two days in response to a defense subpoena. However, he was never called as a witness. Except for a discussion wholly unrelated to the case, the only conversation he had with Mr. Selser in those two days was to inquire as to whether he would be needed. The answer was that he would not be called "today."

Trial counsel, Mr. Selser, took the witness stand on the application. He conceded Pelzer's presence at the trial

under subpoena. But he did not summon him as a witness, since Pelzer said he "was going to say" that he did not remember whether or not D. H. was in the tavern on March 4 because the Prosecutor's men threatened him with the loss of his liquor license on account of sales to minors, if he testified for Smith. This alleged threat was reported to no one. On inquiry at the oral argument as to the reason for this failure, we were advised that counsel did not believe him. Moreover, Selser said Pelzer was "under the influence of intoxicating liquor" at the time. In the course of the Prosecutor's cross examination on this phase of the matter, Pelzer denied that he was intoxicated and said he could not recall having told Selser about a threatened loss of his license if he testified for the defendant. But, as already noted, he conceded that his original information to the Prosecutor had been given without duress or coercion.

The victim's sister's husband, George W. Self, was called. He testified that on the night of March 4, 1957, while he and Mary Zielinski were riding around looking for Victoria, he thought he saw D. H. at Robby's Corral around midnight and again near the Ramsey Police Station at about 1 a.m. He did not actually know whether he had seen D. H.; he "didn't know him that well to say for sure", having seen him only "a couple of times before." His thought was generated by Mary who remarked at the time that "it was him or it looked like him." And Self testified that he did not tell Nicol, the defense investigator that he had seen D. H. a little before 10 p.m. on March 4 as his statement attached to the application for new trial asserted. It appeared also that Self had given a statement to the Prosecutor in question-and-answer form prior to the hearing. In the course of it, in explaining that error, the following took place:

"Q. Then he put something in there that isn't the truth?

A. Yes.

Q. And that is a plain lie?

A. As I told you before, I didn't like [D. H.]. Why should I worry where he is at?

Q. But the investigator put down words that were a lie about an individual in a murder investigation and you signed it?

A. Yes."

This interrogation was included in the cross examination of Self. However, the complete statement was put in evidence, and in fairness we add the question and answer which follow those set forth above:

"Q. Just because you didn't like [D. H.]?

A. No. It wasn't that. Like I said, I don't know what he wrote. I didn't read it too close. I didn't say that to him."

Mrs. Self (formerly Mary F. Zielinski), who, according to her husband's statement, "hated" D. H., testified that she saw him at Robby's Corral about midnight on March 4, 1957. However, she did not go in. Self entered and inquired of Robby about Victoria. According to Self, Robby and one patron sitting at the end of the counter were the only persons present, although it is not clear whether he meant in addition to the person he thought was D. H. He was aware that D. H. was acquainted with Victoria. But he did not testify that any inquiry about her was put to D. H.

The three persons who, according to Pelzer, were in his tavern on March 4, 1957 and who knew that neither D. H. nor Rockefeller was there, were called by the State. Judge J. Frank Young, the municipal magistrate of Mahwah, testified that to the best of his recollection he was not in the place that evening. He said:

"I have a country office and have to have evening appointments. My diary indicates for that evening I had two appointments, one at 8:00 and one at 8:30.

"The one at 8:30 was the preparation of an income tax return for a partnership farming concern in our town which required considerable information to fill out the 1040F and in turn I had to get the information for the two individual returns including the wife of one of the partners who also was employed and, as some farmers do, they didn't keep too good books.

"I feel sure that it was at least 10:00 at the least quarter of 10:00 before I could have possibly been through."

However, he could not say categorically that he had not been in the tavern that evening. He did not know D. H.

Mihok could not remember being present at all on March 4. He testified that after the trial "when they were trying to bring this case back again" Pelzer said to him: "Don't worry, you are going to be there, you are going to be there." Further, Mihok maintained that he did not know D. H. Wastog conceded being in the tavern at about 6:30 or 6:45 after he finished work and remaining there for about an hour and a half. Then he went home.

Wastog had been subpoenaed by the defense during the trial, although previously he had given the same information to the investigator about his visit to the tavern on the evening in question. He was not called upon to testify. According to Mr. Selser, this was because he was "going to say" that he did not remember being in the tavern on March 4 and also because, like Pelzer, he, too, had been drinking. Mr. Selser said also that prior to the trial his investigator had told him that Wastog had informed him that he (Wastog) had been in the tavern until approximately 11 p.m. However, no such fact appears in the statement given to Nicol by Wastog on May 26, 1957. And Nicol was not produced as a witness.

At the hearing a number of grounds for a new trial were presented. The discussion thus far has been confined sub-

stantially to the alleged newly discovered evidence because of the stress placed upon it by the defendant. The trial court held that it was not credible and that it did not qualify as newly discovered in the legal sense.

The character of evidence to qualify as newly discovered and thus to provide a basis for the granting of a new trial is well known. It must be material to the issue and not merely cumulative, nor impeaching nor contradictory; it must have been discovered since the original trial and not discoverable prior thereto by the use of reasonable diligence; and finally its probative force must be such as to persuade the discretion of the trial court that if introduced at a new trial a contrary verdict ought to result. As to the last element, the test is probability and not possibility. *State* v. *Bunk*, 4 N. J. 482, 486 (1950); *State* v. *Haines*, 20 N. J. 438, 444 (1956). The burden of establishing the necessary factors is upon the defendant. Such motions are addressed to the sound discretion of the court; and the exercise of the discretion will not be interfered with on appeal unless a clear abuse of it is shown. The judge, who sat on the original trial, as here, is in a peculiarly advantageous position to evaluate the showing made for a new trial and particularly the credibility of the witnesses. Consequently, great weight must be given to his determination. Any other rule would be completely disruptive of the judicial process. But because life is at stake, we have paused and considered the entire record carefully in order to appraise fully the discretionary act under review.

The thrust of the Pelzer evidence is to attack the credibility of D. H.; to endeavor to show that he was not present in the tavern on the fatal night around 9:15 or 9:20, or engaged in his employment until shortly after 9 p.m. And if the premise that he was not there be accepted, the suggestion is that defendant is corroborated thereby in his assertion that D. H. was at the sand pit with Victoria shortly before or around 9 p.m. and that Smith left them at that site.

In order to reach the intrinsic merit of the issue, we pass the argument of the State that on its face such proof is merely cumulative, and by inference contradictory of D. H.'s testimony at the trial.

The trial judge, who was familiar with the entire matter, after a full hearing in which he allowed the defense wide latitude in the introduction of evidence, found Pelzer to be "a thoroughly unreliable, incredible witness, careless with the truth who has made so many varying, unfounded, untruthful statements about the fact of [D. H.'s] appearance at his tavern the night of March 4th that no person, no juror could give any statement he might make in that respect any credibility whatsoever."

Our own view of the substance of Pelzer's testimony is set out above. The mere outline is enough to demonstrate that it does not carry the ring of truth. And study of it in relation to the entire record leaves an abiding conviction of its untrustworthiness. Judged by the most liberal standard, it would not justify this Court in declaring that the trial court abused his discretion in rejecting it as a basis for vacating the verdict of the jury.

The assertions of Mr. and Mrs. Self are even more remote in their effect upon the case. The apparent purpose was to provide contradiction for D. H.'s statement at the trial that he was in bed by 11 p.m. on March 4, 1957. According to Self, he and his wife disliked him for reasons having no relation to the tragedy in question. Whatever their motivation, we agree with the trial court that the nebulous quality of the testimony, its uncertainty and the fact that Mrs. Self was not produced as a witness at the original trial, deprive it of the evidentiary impact which it should have to warrant a new trial. And this conclusion is inescapable whether their testimonial utterances are treated in isolation or in company with those of Pelzer.

The observations thus far of themselves provide the answer to the last element to be considered in reviewing the trial court's decision, *i.e.*, whether the additional evidence

would probably result in a different verdict upon a new trial. In this connection there is no doubt that the strength of the State's proof of guilt at the original trial is a factor to be weighed. For the more conclusive the evidence against the defendant, the heavier must the burden be to show that the proffered augmentation of the record ought to induce a jury to bring in a contrary result. We have re-examined the original record, as well as the earlier opinion, and find no basis whatever for withdrawing from or qualifying our determination that the evidence was devastatingly convincing of the defendant's guilt. Appraisal of the allegedly newly discovered evidence has been engaged in with a deep consciousness that our judgment represents the exhaustion of the judicial process. But it has led to concurrence in the view of the trial court that the additional proof probably would not change the result. For these reasons, we find no sufficient basis for a holding that his discretion was abused in denying a new trial.

II

In the petition for a new trial, defendant applied to the court to bring in at the hearing Dr. Raphael Gilady, the County Medical Examiner who performed an autopsy upon the decedent, so that he could be examined further with respect to the time of death. The doctor had testified on the subject at the original trial and had been cross examined by counsel for the defense. The purpose of the new request was this: The victim's skull and brain were so destroyed that death was immediate, according to the doctor. Smith's position at the trial was to the effect that he could not have had any contact with her after 9:30 p.m. So if the death could not have occurred prior to that hour, he could not be guilty.

According to the trial record, Dr. Gilady's autopsy took place between 12:30 and 1 p.m. on March 5. He certified on the death certificate that the demise occurred "about 10-11 p.m.". It was arguable that some of his testimony

was susceptible of the inference that it might have happened around midnight. Counsel pursued the matter on cross examination. And the final specific question on the subject was:

> "Q. So it was, in your judgment, not later than 11 o'clock—not earlier than 11 o'clock, I mean, or perhaps not later than one?
>
> A. It could have been earlier than 11 o'clock because the prevailing weather was so cold and the body might have stiffened up, according to standard data.
>
> With rigor mortis setting in in the normal way and the normal atmosphere and the normal temperature, the time of death would be established at 12 hours, either an hour later or an hour earlier, but with the prevailing weather being as cold as it was, it was very hard to determine when it was exactly."

Proof was adduced to show that the minimum temperature range between midnight March 4 and midnight March 5 was 12 to 22 degrees Fahrenheit. At 11:30 p.m. on March 4 it was 29 degrees or less. The readings were taken at the Newark Airport and the meteorologist testified that at Mahwah on the average they would be 10 degrees lower.

Defense counsel argued at length in his summation to the jury that on the basis of Dr. Gilady's testimony, the murder of necessity was committed long after Smith left the sand pit. And in support of his position he quoted verbatim some of the doctor's questions and answers. The Prosecutor answered the issue specifically in his closing address and he too read additional parts of the medical testimony. The jury resolved the problem by concluding that the defendant killed the decedent.

It is asserted in the moving papers that prior to the present hearing defense counsel communicated with Dr. Gilady and asked whether or not he could say with reasonable probability that the victim could have been killed as

early as 9:30 o'clock. And the affidavit sets forth that the doctor declined to discuss the matter unless the Court or the Prosecutor would authorize him to do so. For this reason, the Court was requested to order the doctor to attend the hearing and testify on the subject.

The Court declined to do so and we see no abuse of his discretion in the ruling. Manifestly, the doctor and the autopsy report were subject to subpoena and if defendant desired to have them in court, the purpose was simple of accomplishment. Moreover, it cannot escape notice that defendant produced no independent medical proof either at the trial or during the proceedings in the matter now before us.

Nor can it be ignored that the time element with respect to the death was questioned, discussed and argued about at the trial. And although the precise question now desired to be asked was not put by counsel on cross examination, the relation in time between the alleged hour of defendant's departure from the sand pit and the hour of death was fully exploited. The fact remains that regardless of the uncertainty as to the exact time of death, the jury decided on all of the facts that Smith perpetrated the homicide in the sand pit on the night of March 4 and the record irresistibly justifies their finding.

III

Error is predicated on the denial by the trial court of a request to have defendant attend the hearing on the motion for new trial. There was no statement on the motion that Smith was to be a witness; on the contrary, the moving papers contained material which was beyond Smith's personal knowledge. Nor was any representation made to the court thereafter during the hearing or at the conclusion of the testimony or even after the adverse determination that defendant had pertinent information to present in rebuttal. At the oral argument before us, counsel stated that Smith could have questioned the assertion of one witness, who

had been in attendance at Pelzer's Tavern on the evening of March 4, that he did not know D. H. Accepting the representation, such rebuttal, if introduced, could not have affected the result. Complete elimination of the witness' testimony would be without material significance in the case.

Reference is made to Article I, ¶10, of the New Jersey Constitution, and to the 5th and 6th Amendments of the United States Constitution, in support of the contention. The precise question has not been dealt with previously in this State. The weight of authority in other jurisdictions is that the constitutional right to be present applies to the trial, the proceeding for the determination of the guilt or innocence of the accused. It does not require his appearance at a post-conviction hearing on a motion for a new trial. *Barber* v. *United States*, 142 F. 2d 805 (4th Cir. 1944), cert. den. 322 U. S. 741, 88 L. Ed. 1574 (1944); *Joseph* v. *State*, 236 Ind. 529, 141 N. E. 2d 109 (1957), cert. denied (but limited to a different question), 355 U. S. 812, 2 L. Ed. 2d 30 (1957); *Carman* v. *State*, 208 Ind. 297, 196 N. E. 78 (1935); *State* v. *Johnson*, 156 La. 875, 101 So. 259 (1924); *State* v. *Dry*, 152 N. C. 813, 67 S. E. 1000 (1910); *Rigsby* v. *State*, 55 Okla. Crim. App. 61, 24 P. 2d 1016 (1933); *Commonwealth* v. *Burke*, 169 Pa. Super. 633, 84 A. 2d 254 (Pa. Super. 1951); *Cisco* v. *State*, 160 Tenn. 681, 28 S. W. 2d 338 (1930); 23 C.J.S. 307, 1325; and *cf.* *State* v. *Bentley*, 46 N. J. Super. 193, 204 (App. Div. 1957). Our Rules of Criminal Practice reflect the general rule. R.R. 3:5-4(a) calls for the presence of the defendant "at every stage of the *trial* including the impaneling of the jury and the return of the verdict, and at the imposition of sentence * * *." (Emphasis added.)

Defendant's application therefore was addressed to the discretion of the court. Although it might very well have been received favorably since the case is a capital one, the record provides no basis for overruling the action taken.

IV

Defendant argues that because the hearing on the quest for a new trial was pursuant to an order which in its form ordered the State to show cause why "the judgment of conviction * * * should not be set aside and a new trial granted * * * on the ground of the alleged newly discovered evidence", the burden was cast upon the State of sustaining the original verdict. The claim is legally frivolous. Manifestly, the onus of establishing the elements necessary to warrant a new trial is on the defendant. 39 *Am. Jur., New Trial*, §156.

Defendant prepared the moving papers and activated the matter by the order to show cause in the form chosen by him. Under the rules of criminal and civil practice, such applications are prosecuted by motion, which course should have been followed in this instance. R.R. 3:7-4; 4:62-2. The urgency of the cause undoubtedly influenced the trial court to overlook the deficiency in form.

V

The sole remaining point raised on appeal is that cross examination of the witness Wastog was curtailed improperly. There is no merit in it. Our examination of the testimony convinces us that the action taken was a legitimate exercise of discretion, and, in any event, without any prejudicial effect upon the new trial proceeding.

VI

The order of the trial court denying a new trial is affirmed.

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# Supreme Court of New Jersey

DOCKET NO. 2359

STATE OF NEW JERSEY,
*Plaintiff-Respondent,*

*vs.*

EDGAR SMITH, also known as EDGAR H. SMITH,
*Defendant-Appellant.*

Criminal Action
(On Indictment No. S-276-55 for Murder)

On Appeal from Judgment of Conviction of the Bergen County Court—Law Division

Sat Below:
O'Dea, J.C.C. and a Jury

## OPINION OF NEW JERSEY SUPREME COURT (WACHENFELD, J.)

**[Reported in 27 N. J. 433 (1958)]**

Law Reporter Printing Co., 79 Commerce Street, Newark, N. J.—Market 3-6011-12

# Supreme Court of New Jersey

No. A-140 Sept. Term 1957

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State of New Jersey,

Plaintiff-Respondent,

*v.*

Edgar Smith, also known as Edgar H. Smith,

Defendant-Appellant.

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On appeal from the Bergen County Court, Law Division,

Mr. John E. Selser and Mr. Herbert L. Smith argued the cause for appellant.

Mr. Thomas S. O'Brien argued the cause for the State.

Mr. Guy W. Calissi, Attorney. Mr. William C. Brudnick, on the brief.

The opinion of the court was delivered by

Wachenfeld, *J.*

*The defendant, Edgar Smith,* having been convicted of first-degree murder without a recommendation by the jury, appeals the judgment of death rendered against him, contending he was denied a fair trial, that the verdict was against the weight of the evidence, and that prejudicial error was committed requiring a reversal of the conviction returned.

The points contended for by the defendant will be disposed of in the order in which they are presented in his brief.

The factual developments, although disputed in many respects, will be set forth fully since they have a direct relationship to some of the issues raised.

The victim, Victoria Zielinski, a fifteen-year-old school girl, resided in Ramsey, Bergen County, New Jersey. At about 7:30 p.m. on March 4, 1957, she left her home, intending to walk to the house of her friend, Barbara Nixon, located on the same street, Wyckoff Avenue, about eight-tenths of a mile away. She was accompanied by her thirteen-year-old sister, Myrna. Myrna left her sister about two houses away from her destination and returned home alone. The two girls had arranged that at 8:30 p.m. Victoria would leave the Nixon home and Myrna would leave her own home and they would meet half way on Wyckoff Avenue and walk home together.

Myrna started toward the Nixon home at 8:40 but did not meet her sister as planned. She went to the Nixon home, arriving there at about 8:50, and ascertained that Victoria had left there at about 8:30. Barbara Nixon had accompanied Victoria outside and had seen her walking toward her home. Barbara had lent her a gray scarf, and she testified that when Victoria left for home no cars were seen passing on Wyckoff Avenue in either direction.

While Myrna was returning home at about 9:05 or 9:10 p.m. she saw a boy, designated as D. H. for the purposes of this opinion, drive past going in the direction of Ramsey at 50 or 60 miles an hour. He was alone in the car. Myrna testified that D. H. had known Victoria but had never dated her. At the trial, D. H. admitted he had taken Victoria out approximately ten times.

When Myrna arrived home at about 9:10 p.m., she informed her mother, Mrs. Mary Zielinski, that Victoria had not met her as planned. Mrs. Zielinski was not unduly disturbed and took no immediate action. When Victoria had not appeared by 12:30 a.m., however, Mrs. Zielinski awakened her husband, Anthony, who had retired at 8:30 p.m. and told him the girl was missing. Mr. Zielinski got up, dressed, and with his oldest daughter, Mary, went out to look for Victoria.

While driving down Wyckoff Avenue, Mr. Zielinski and Mary encountered a patrol car and talked to the policemen who were in it. They then went on to a milk bar in Ramsey but were unsuccessful in finding Victoria, returning home about 1:00 a.m. Shortly thereafter, Mr. Zielinski and his wife went out to continue the search, driving past the Nixons' and going to another milk bar. After about an hour, the elder Zielinskis repaired to their home, and there continued their vigil until daybreak.

As soon as it was light, Mr. and Mrs. Zielinski resumed their search for their daughter. They visited the Nixons, who reported they had not seen Victoria since she left their home on the previous evening. They then went downtown and gave Victoria's picture to a Ramsey police officer. Afterwards, the Zielinskis cruised around the streets in the vicinity of Wyckoff Avenue.

At about 9:00 a.m., Mr. Zielinski noticed a black loafer lying in the street near the intersection of Fardale Avenue and Chapel Road. As he stopped his car, he also noted a kerchief, or babushka approximately 20 feet further up the road. It was stained with blood. He immediately dispatched his wife for the police, and then clambered over a low wall on the right-hand side of the road and began to search through the underbrush beyond. Finding nothing there, he went to the entrance of a sand pit situated just beyond the intersection of Fardale and Chapel, where he discovered a pair of red gloves. He returned to his automobile.

By this time, Captain Wickham of the Mahwah Police Department had arrived on the scene, and together he and Mr. Zielinski searched both sides of the dirt road leading into the sand pit. There were tire tracks on the road. When they reached the top of a mound of dirt beyond the end of the dirt road, Mr. Zielinski discovered a silver locket belonging to Victoria, her other loafer, various footprints, stones covered with blood, and an area of ground which had been "scuffed." He then saw "brains scattered

for seven or eight feet along the bank." He looked over the edge of the mound and saw her body "in a jackknifed position."

Victoria was lying face down with her sweater pulled up around her neck and her brassiere down around her midriff. One of its straps was broken. She was still wearing dungarees. One of her socks was completely off while the other was hanging on her foot. Her windbreaker was lying beside her. There was a hole in the back of her head and much of her hair was gone. A hank of hair matted with blood was subsequently found on Fardale Avenue near the loafer first discovered by Mr. Zielinski. At the trial, Mrs. Zielinski, Myrna Zielinski and Barbara Nixon identified the clothing and accessories found on or near Victoria's body as those she had worn before she disappeared.

The autopsical examination revealed the cause of death as "the total crushing of the skull with a decerebration, traumatic." Victoria's brain and left eye were completely destroyed. Her teeth were hanging loosely in her mouth and her nose and jaw had sustained multiple fractures. Both her hands were covered with blood, and her fingernails were ripped. There was no evidence of a carnal assault. There were no marks on her body from the neck down, save for four or five small bruises on her right breast, apparently teethmarks.

Because the weather had been below freezing, the County Medical Examiner was unable to fix precisely the time of death, stating "the time of death in the winter with rigor mortis is a very moot problem" and "(t)he prevailing weather has a great deal to do with the setting in of rigor mortis or the dissolution, and I estimate that she was dead about 12 hours, give and take an hour." Since the autopsy had taken place at about 1:00 p.m. on March 5, this estimates placed the time of death at around 12:30 or 1:00 a.m. on March 5. On cross examination, the Medical Examiner emphasized, however, that the exact time of

death could not be fixed and further clarified his findings by stating:

> "Q. So it was (the time of death), in your judgment, not * * * earlier than 11 o'clock * * * or perhaps not later than one? A. It could have been earlier than 11 o'clock because the prevailing weather was so cold and the body might have stiffened up, according to standard data.
>
> "With rigor mortis setting in in the normal way and the normal atmosphere and the normal temperature, the time of death would be established at 12 hours, either an hour later or an hour earlier, but with the prevailing weather being as cold as it was, it was very hard to determine when it was exactly."

The defendant, Smith, was twenty-three years of age with a wife and family. Prior to the date of the murder, he had been employed at various jobs for short periods of time. His last employment was with a seat cover and automobile muffler shop which had hired him to help install hydraulic lifts and other equipment in its garage. Smith was discharged from this job on March 4, 1957, after working for approximately a week.

Defendant's possible connection with the murder was brought to the attention of the police by Joseph Gilroy, a friend of Smith, who testified as to what caused his suspicions.

On March 4, 1957, Smith telephoned Gilroy from the Paramus Bowling Alleys on Route 17 and requested him to drive over. Gilroy arrived at the alleys at approximately 4:30 p.m. and bowled four or five games with Smith and another friend, Charles Rockefeller. All three left the alleys at about 6:30 p.m. in Gilroy's automobile, a 1950 Mercury convertible. While journeying home, Smith asked Gilroy if he could borrow the latter's car in order to procure some kerosene for the heater in the trailer where Smith lived with his wife and baby. Gilroy consented, and

Smith took the automobile after dropping off Gilroy and Rockefeller at their respective homes.

Around 9:15 p.m., Smith telephoned Gilroy at his home. He said he was sick and had been unable to light the heater and asked Gilroy to drive him and his family to his mother-in-law's residence in Ridgewood. Gilroy agreed, and Smith came by for him in the Mercury at about 9:45 p.m.. The two men then drove to the trailer to get Smith's wife and child.

On the way to the trailer, Smith volunteered the information that he had vomited on the trousers he had been wearing earlier and had had to dispose of them, not saying where. Gilroy stated that in his opinion Smith did not look ill at the time.

After picking up Smith's family, Gilroy drove them to Ridgewood and then returned home. At about 12:00 noon on the succeeding day, March 5, Smith again telephoned Gilroy, this time asking him to drive the Smiths from Ridgewood back to the trailer. Gilroy acquiesced and thereupon drove to a gas station, where he encountered D. H. The two drove to Ridgewood in Gilroy's car.

During the journey, D. H. and Gilroy talked about the murder. D. H., who, from a conversation at the gas station, knew that Smith had borrowed Gilroy's automobile on the preceding night, told Gilroy he was "going to tell Eddie that the police are looking for a Mercury." Apparently, this was regarded as a joke. Gilroy testified that actually D. H. "didn't know if the police were looking for a Mercury." When Smith emerged from his mother-in-law's home, D. H. "winked" at Gilroy and then told Smith the police had discovered "tire prints" and were "going to check all the Mercurys in Bergen County." Gilroy testified that Smith reacted with "a startled look on his face."

While driving to the trailer, the occupants of D. H.'s automobile discussed the murder, D. H. stating he had driven past Myrna Zielinski on Wyckoff Avenue the previous evening. Either Smith or his wife picked up a lipstick

from the floor of D. H.'s car and handed it to D. H. saying "Maybe this is Vickie's lipstick." D. H. replied "No" and threw it out the window.

When the party arrived at defendant's trailer, Smith got out of the car and returned with a pair of shoes which he placed in the back. D. H., Gilroy and Smith then drove downtown, where Smith left the other two, saying he was going to get a cup of coffee. He took the shoes but did not have them with him when he later rejoined D. H. and Gilroy.

Some time later, Gilroy noted stains on the driver's seat and floor mat of his car. He habitually carried baseball equipment in the car and a bat was missing from the back seat. This bat was subsequently discovered in the woods near the intersection of Fardale Avenue and Chapel. It was ingrained with blood. The presence of the stains, conjoined with Smith's behavior concerning the trousers and the shoes, sharpened Gilroy's suspicions. He showed the stains to D. H., Rockefeller and another friend, and, upon their advice, went to the Ramsey police.

Acting on the information supplied by Gilroy, at about 11:30 p.m. on March 5 Detective Graber and other officers went to Ridgewood and took Smith into custody at his mother-in-law's home. Smith was removed to the Mahwah Police headquarters and there interrogated. Subsequently, he accompanied the police to Ramsey, where his shoes were retrieved from a garbage pail. Both shoes were liberally impregnated with human blood and proved to be exact duplicates of plaster impressions taken of footprints at the scene of the crime. The tongue of one and part of the soles of both were missing.

Later, Smith was taken to the sand pit, where, at around 7:40 p.m. on the previous night, he claimed to have pulled just a short way into the dirt road in order to "throw up". No evidence of vomit was found. Smith refused to walk over to the place where the body had lain, saying "he did not know what was over there" and "had never been

back in that vicinity." He told the police he had thrown away his trousers in a certain area along Pulis Avenue after vomiting on them, but a search for the trousers was fruitless. In addition to combing the Pulis Avenue vicinity, the police also looked along Wyckoff Avenue where Smith claimed to have vomited before entering the sand pit. Again, nothing was found. The jacket Smith had been wearing on the night of March 4 was recovered from his mother-in-law's home, but according to the testimony of Detective Graber, the defendant said it "would not do us much good" since defendant had already washed it.

Captain DeMarco of the Bergen County Prosecutor's Office testified he had examined Smith's hands and legs during the course of the initial interrogation at Mahwah Police Headquarters and had discovered that defendant's hand and one knee was lacerated while his other knee displayed a recent contusion. Smith claimed to have injured his hand while repairing an automobile tailpipe and said the knee injuries had resulted from his falling out of Gilroy's car on the night of March 4 when he vomited on Wyckoff Avenue. Captain DeMarco also related that Smith told his interrogators, "If you are looking for a fall guy, why don't you grab D. H.?"

After his trip to the sand pit in the company of the officers, Smith was taken to the Prosecutor's office and questioned further by detective DeLisle, who testified that the defendant broke down and started to cry at about 10:00 a.m. on March 6, requesting permission to see a priest. After a slight interval Smith regained his composure and then admitted driving Victoria Zielinski to the sand pit in Gilroy's automobile on the night of March 4. He stated the girl had "babbled" something about "school and a note" and had gotten extremely excited and attempted to leave the car, whereupon he, Smith, had hit her "a good shot." The questioning was interrupted while Smith talked with the priest whom he had asked to see. Then the defendant gave a lengthy statement under oath in which

he related in some detail his activities on the day of March 4. Subsequently, Smith, on the advice of his attorney, refused to sign this statement, but he conceded its accuracy. It was admitted into evidence at the trial. The officers who were present and the stenographer who recorded the statement testified the defendant gave it calmly and voluntarily. Smith began his statement in the Prosecutor's office and continued making it as he and the police revisited the vicinity of the crime. The substance of Smith's admissions follows.

On the morning of March 4, 1957, he was laid off from his job. He spent most of the afternoon at a bowling alley in Paramus and left for his trailer home at about 6:30 p.m. with Gilroy and Rockefeller. He borrowed Gilroy's car and drove to a gas station where he purchased five gallons of kerosene. He returned home shortly before 8:00 p.m. and tried to light his heater but was unsuccessful. He decided that he needed more kerosene. Before he drove off, his wife returned from the doctor's accompanied by her mother. Smith informed them of his errand and left. He bought five more gallons of kerosene at a Ramsey service station and started to return home via Wyckoff Avenue at about 8:30 p.m.

Near Fardale Avenue in Mahwah, he saw Victoria Zielinski, whom he knew casually "from meeting her in town," walking along the street. He was proceeding in the opposite direction and was going to pass her by, but she yelled or motioned for him to stop. He turned around and came back and she requested a ride to her home. Smith had driven her home on several previous occasions, and he agreed. The time was approximately 8:35 p.m.

Shortly before they reached the Zielinski residence, Victoria told Smith that her sister was walking to meet her and that she did not want Myrna to see her in the car with him because "she was in trouble with her family". She asked him to drive around the block. He complied, turning off Wyckoff Avenue onto West Crescent Avenue,

the last street before her house. When they arrived at the sand pit off Chapel Road near Fardale, he turned in of his own accord. Defendant and the victim sat in the car and talked as Smith smoked a cigarette.

Victoria told him she was having difficulty with her family over cutting school and that they had found out about a false note she had prepared and sent to the school under her mother's name. Suddenly, and according to Smith for no apparent reason, she said: "I am going to get out and walk home. I am going to tell my father. I am going to go home and tell him you are like the rest of the guys."

She started to leave the car. Smith, feeling he was responsible for seeing her home, reached across the seat and grabbed her arm. She struggled and got part of the way out of the car as he worked his way across to the passenger's side of the front seat. When he tried to follow her out, she "started yelling something" and "swinging at me and sort of slapping." He swung in her direction with his right arm, "a fist or a slap," but could not remember whether or not he hit her. "The next thing I actually realized was getting back into the car."

Defendant stated his recollection of the events succeeding the struggle was "vague"; "that's where somebody pulled the switch." He was unable to recall whether or not he had struck Victoria more than once or with something other than his fist. He had "a feeling of running somewhere," of "chasing somebody." The ground was "soft." He said: "I think I recollect running in the sand with my shoe off."

Smith was alone when he got back into the car and his right foot was cold. Later, he realized he had lost his shoe. He backed the automobile onto Chapel Road and after proceeding forty or fifty yards stopped by the edge of a wooded area where he remembered seeing a Christmas tree he had thrown away there. Victoria's schoolbooks and pocketbook were in the car when he left the sand pit

but not there when he arrived home. He thought he had probably thrown the books and the pocketbook into the woods near the Christmas tree.

When he arrived home, Smith realized for the first time that his trousers and socks were bloody. He told his wife he had been sick. She gave him a clean pair of pants. He threw the bloody socks into a patio outside the trailer. Once again, he tried to light the kerosene heater and failed. He telephoned Gilroy and asked the latter to drive him and his family to Ridgewood. He went alone to pick up Gilroy and took the bloody trousers and a "twelve volt lantern" with him.

Before going to Gilroy's home, Smith returned to the sand pit. Utilizing the lantern he found his other shoe. He also saw a red mitten or glove but "didn't think anything of it" and kicked it off to one side. Between the sand pit and Gilroy's, he disposed of the bloody trousers, but could not remember how. By the time he reached Gilroy's home, he had "completely forgotten about the whole thing . . . (j)ust like it never happened."

When he and Gilroy arrived back at the trailer, Smith placed the shoe he had recovered from the sand pit in the bedroom with its mate. He and his family were then driven to Ridgewood by Gilroy. Smith "watched the end of the television show," "washed up," and went to bed at about 10:00 p.m. He "never realized anything was wrong at all."

The next morning he got up and washed the shirt and jacket he had been wearing on the previous night. Around 11:30 a.m., he heard a news broadcast reporting Victoria's death. He began to get "curious"; "Something was snapping in the back of my head." Early that afternoon, he discussed the homicide with Gilroy over the telephone, and "(t)hat's when it dawned on me that I had been with her the night before and something snapped in the back of my head that I did it and I knew it in the back of my head (but) I couldn't convince myself." Later when D. H. told

him the police were checking Mercury registrations. "(t)hat's when it hit me really hard I must have been the one who really did it." Subsequently, as already described, defendant placed his shoes in a garbage pail from which they were removed by the police.

Smith told his interrogators he had been "cold sober" on the night of the 4th but that after he had swung at Victoria "(t)hings turned sort of red and then black." He estimated he had spent ten to fifteen minutes in the sand pit the first time and said that the wounds on his hand and knees must have been inflicted during the interval between the time when his memory went blank and the next morning. He could not recall precisely how he had sustained them. He denied making any advances to Victoria.

Smith's trousers with two socks stuffed into the pockets were located by the police. Both the socks and khakis were stained with type "O" human blood, the same type found on the victim's sweater, jacket, brassiere, gloves and scarf. Smith's blood type is "A." Following Smith's directions, the officers recovered Victoria's handbag and school books. Defendant identified the shoes, trousers, socks, jacket and wool shirt as the clothes he had been wearing on the night of the crime.

While engaged in making his statement, Smith was asked whether he had been mistreated and replied, "No," saying his treatment had been "(b)etter than expected."

Testifying on his own behalf at the trial, Smith materially changed his version of what had occurred on the night of March 4th. He stated Victoria, not he, had suggested that they park in the sand pit so that she could discuss something important with him. After they had parked, she told him his wife was running around with another man. He was greatly upset and slapped her face, telling her to get out of the car. She left and started walking down the road.

A few moments thereafter, while he was preparing to leave the pit, defendant heard a commotion and saw two

figures coming up the road. He quickly got out of the car and his "bad" ankle, which had been struck by a bowling ball earlier in the day, collapsed under him, his right shoe coming off. Since the identities of the oncoming persons were unknown and it was a lonely spot, he seized the baseball bat from the back seat of the car for protection.

As the figures approached, he recognized them as Victoria and D. H. Victoria was bleeding from a cut over her ear. Smith asked D. H. what had happened, and the latter replied the girl had fallen on the road. Smith examined the wound and in the process got blood on his hands and trousers. Feeling she should be taken to a doctor, he placed her in the automobile, but D. H. grabbed her and forcibly pulled her out, telling Smith to leave her alone, that he, D. H., would take care of her. Victoria pleaded with Smith for succor, but since D. H. knew her much better than he, Smith decided he should not interfere further and drove off, leaving his shoe and the baseball bat behind.

When he returned to the sand pit later that evening, while on his way to Gilroy's, defendant saw the baseball bat and noted it had been split but did not pick it up. He also noticed the red glove.

Before reaching Gilroy's home, Smith encountered D. H., who was parked on Main Street in Ramsey. Smith stopped and inquired how Victoria was, and D. H. told him: "Don't worry about her, forget about her. Don't say anything about tonight or we will all be in trouble * * * If you mention my name or use my name in this, I'm going to get your wife and baby." Smith was puzzled as to why this threat was made.

The next day he took his shoes to a shoemaker for repair, but upon being informed that they were not worth fixing, threw them into the garbage pail where the police later found them. With respect to the scratches and contusions on his knees, he testified he had injured himself when he fell while trying to pour kerosene into the heater in his trailer. When confronted on cross examination by the dis-

crepancies between his earlier statement and his trial testimony. Smith persistently maintained he had falsified the statement in order to avoid implicating D. H. in the crime since the latter had threatened Smith's wife and child. It admitted, however, that during his first interrogation at the Mahway police headquarters he had told the officers to get D. H. if they wanted a "fall guy."

Smith's main defense in substance was that D. H. and not he, was the murderer. Both D. H. and the pharmacist in the drug store where he was employed testified, however, that the former had worked at his employment from 6:00 p.m. to 9:00 p.m. on the night in question. D. H. had been dispatched on an errand at 8:35 p.m. but returned just before nine with the package he had been sent to pick up. D. H. stated that after leaving work at nine or shortly thereafter he went immediately to a tavern in Mahwah and thence to a milk bar on Route 17. His testimony was corroborated as to times and places by four other witnesses. D. H. denied having seen either Smith or Victoria on the night of March 4th and also stated he had not gone to the sand pit on the occasion in question. There was no proof to the contrary except Smith's testimony.

Defendant was convicted of first degree murder without recommendation, and the mandatory death sentence followed.

*Point I*

The trial court, it is said, committed prejudicial error by sanctioning the admission of Exhibits S-34, S-41, S-43, S-44 and S-45 over objection. They are colored transparencies, except S-34 and S-45, which are enlarged prints of S-44 and S-31.

It is contended there was not a proper foundation justifying their admission. The record conclusively shows the contrary. Ample evidence appears that the pictures "truly and accurately represent the scene around the body and all the circumstances at the time * * *."

Photographs, of course, must be proved to be faithful representations of the subject at the time in question and are admitted into evidence as an aid to the jury in making its factual determination. Fundamentally, photographs are deemed to be pictorial communications of a qualified witness.

Enlargements as well as colored photographs, within proper limitations, are admissible in the discretion of the trial court. *State v. Briggs*, 26 N. J. 45 (1958); *State v. Wise*, 19 N. J. 59 (1955); *State v. Hall*, 14 N. J. 240 (1954).

The photographer testified: "The color might be slightly exaggerated to the red side, but this is exactly what I saw." Therefore, it is urged some of the pictures were prejudicial because of the distortion or exaggeration of the redness of the color of the bloody area depicted by them. We find nothing from the record or our examination of the pictures themselves warranting such a conclusion.

Many of our decisions have determined that photographs, despite their inflammatory nature, are nevertheless admissible if they are probative of some material fact. *State v. Wise*, supra; *State v. Hall*, supra; *State v. Meyers*, 7 N. J. 465 (1951); *State v. Heathcoat*, 119 N. J. L. 33 (E. & A. 1937); *State v. Burrell*, 112 N. J. L. 31 (E. & A. 1933); *State v. Fine*, 110 N. J. L. 67 (E. & A. 1932); *State v. Aeschbach*, 107 N. J. L. 423 (E. & A. 1931); *State v. Fiori*, 94 N. J. L. 477 (E. & A. 1920).

The probative force, however, is not always completely determinative of the admissibility of the exhibits. There are cases where the logical relevance of such exhibits might well be overwhelmed by their inherently prejudicial qualities, which would impair the defendant's right to a fair and impartial trial. When this occurs, they of course should not be admitted. *State v. Briggs*, supra.

In the case *sub judice*, however, the pictures do not come within this classification, but rather within the rule as we have already pronounced it many times that "(p)hotographs of unpleasant and gruesome aspects of a murder case are

not objectionable for this reason alone * * *" *State v. Huff* supra at 251.

*Point II*

Did the court's charge to the jury accurately state the law or was it erroneous, resulting in manifest injury to the defendant in the following respects:

(a) Improperly stated the law as to the length of time involved in deliberation and premeditation;

(b) Failed to properly inform the jury that lack of evidence might be taken into account in determining whether reasonable doubt existed as to defendant's guilt;

(c) Did not properly distinguish between first and second degree murder;

(d) Limited the jury's consideration of the element of "time of killing" to credibility and to the testimony of one of the State's witnesses only.

(a)

It is said a portion of the charge in reference to premeditation and deliberation "was not only incorrect, but confusing." This assertion is based upon the supposition that the charge left the jury with the belief that, with respect to premeditation and deliberation, no time need intervene between the formation of the purpose to kill and its execution. The criticized portion is: " * * * but no length of time need intervene * * *" Defendant insists the trial judge committed reversible error by omitting the word "particular" between "no" and "length".

This position is only tenable if an isolated sentence of the charge is permitted to be construed out of context and unconnected with what preceded and followed. We have frequently decided this cannot be done.

In determining whether or not error was committed, a single sentence may not be extracted and construed without regard to the context of the entire charge.

"* * * The court cannot state the law of the case in a single sentence and the charge must be read as a whole in the light of a sensible construction to determine its legal worth. * * * Although certain sentences in a charge taken alone may need some amplification to render them accurate, yet if such amplification be given in the context so that the jury cannot be misled, there is no error justifying reversal. * * *" *State* v. *Tansimore*, 3 N. J. 516, 525 (1950). See also *State* v. *Kollarik*, 22 N. J. 558, 566 (1956); *State* v. *Janiec*, 11 N. J. 397, 401 (1953); *State* v. *Goodman*, 9 N. J. 569, 588 (1952); *State* v. *Buck*, 4 N. J. 461, 473-74 (1950); *State* v. *Fuersten*, 103 N.J.L. 383, 386-87 (E. & A. 1926); *State* v. *Sage*, 99 N.J.L. 229, 233-35 (E. & A. 1923).

Following the isolated sentence complained of in which the word "particular" was not used, the court charged:

> "* * * It is not necessary that deliberation and premeditation should continue for an hour or a minute. It is enough to satisfy the element of deliberation and premeditation that the design to kill be conceived and purposefully executed. If the time intervening for deliberation and premeditation is sufficient, fully and clearly to conceive the design to kill and purposely and deliberately execute (it), the requirements of these elements are satisfied."

The court further clarified the necessity of the time element by using a negative approach in saying:

> "One who forms in his mind an intent to kill and who instantly carries out such intent in a flash without any thought or consideration whatsoever, is not guilty of murder in the first degree, because in such a case the elements of deliberation and premeditation are lacking."

Again the court charged:

> "* * * then you determine from the facts you find and according to the law as charged whether the mur-

> derous act, the killing, the bashing and crushing of her head, the brai[illegible] that caused her death were committed with intent to take her life, to kill her willfully, deliberately, with premeditation, with full knowledge of the consequences with some time to think it all out in advance of the execution of the acts."

There is little substance to defendant's claim. The full import of the charge taken in context shows clearly the jury was informed that there must be an interval of time, however small, between the formation of the intent to kill and its execution. Such is our law. *State v. Sage, supra,* presents facts almost identical to those *sub judice*, and it is controlling.

(b)

Although the defendant admits the court charged,

> "If from the evidence adduced or from the lack of evidence there is reasonable doubt remaining the accused is entitled to the benefit of it by an acquittal."

he contends this instruction was inconsistent with, and practically nullified by, another portion in which the court charged:

> "If you find after a consideration * * * of all of the evidence * * *, after consideration and deliberation of all of the evidence that the State has failed to prove beyond a reasonable doubt that the defendant dealt the mortal blows * * *, then your verdict shall be not guilty. * * *
>
> * * * *
>
> "* * * Reasonable doubt is that state of the case which after the entire comparison and consideration of all the evidence leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge."

We cannot so conclude. One portion of the charge was an amplification of the other and, taken in conjunction, they clearly and correctly defined to the jury the obligation of the State and the rights of the defendant.

It is said: "These passages do not meet the standards of *State* v. *De Paola*, (5 N. J. 1 (1950))." Quite to the contrary, they do. In *De Paola* a request was made to charge concerning the lack of evidence and the fact that it could be taken into consideration by the jury. The court refused so to charge and we termed it error.

In the instant case, there was likewise a request to charge, defendant's request No. 16, but here there was no refusal to charge. The Court not only charged the request submitted but adopted language similar to that employed by the defendant.

Furthermore, the court, for the benefit of the defendant, instructed the jury:

> "* * * As to the presumption of innocence. It is a principle of law that a person charged with crime is presumed to be innocent until proven guilty beyond a reasonable doubt; and this presumption of innocence abides with him through the trial so that therefore, when the jury go from the bar of the court to their room to deliberate, they enter that room with the presumption of innocence still protecting the accused unless and until each of the twelve jurors are satisfied beyond a reasonable doubt of his guilt."

Additionally, it was stated the burden of proof was upon the State to prove:

> "* * * beyond a reasonable doubt every material, essential element of the offense and if upon such proof there be a reasonable doubt with regard to the guilt of the assault he is entitled to the benefit of that doubt. Such burden of proof remains upon the State throughout the whole case and never shifts to the defendant."

The charge was harmfully defective, says the defendant, in that it failed to properly distinguish between first and second degree murder. * * * It is not here asserted that as far as the court went, that second degree murder was improperly defined, but the error complained of is that the court did not instruct the jury that intent to kill was not of itself sufficient to raise second degree murder to first degree murder."

True, the intent to kill is not by itself sufficient to raise second degree murder to first degree murder, nor may a charge be susceptible of the interpretation that on a mere finding of such an intent the jury must return a verdict of guilt in the greater degree. *State* v. *Alexander*, 7 N. J. 585, 598-99 (1951).

The record indicates, however, that the trial court painstakingly instructed the jury step by step as to the elements necessary to find first degree murder and second degree murder. It outlined five factors which were to be considered. It instructed that the first three, killing, malice and unlawful act, by themselves constituted only second degree murder and:

> "In order to make out a case of first-degree murder, the fourth and fifth, or the two additional elements, must be each proved beyond a reasonable doubt.
>
> "Fourth, an intent to kill; the killing must be intentional, and fifth, the killing must be willful, deliberate and premeditated."

Again, the court charged:

> "If you find there was no intent to take her life * * * that killing by death-dealing blows was not willful, deliberate and premeditated, then your verdict shall be guilty of murder in the second degree. * * * If you find * * * that the murder was with intent to kill Vickie Zielinski, willful, deliberate and premeditated

* * * then your findings shall be murder in the first degree. * * * "

The court's explanation of the differences between the elements necessary to constitute second degree murder and first degree murder was proper under our law. The trial judge plainly instructed the jury that intent, premeditation and deliberation were necessary to sustain the verdict of the higher degree.

(d)

The defendant insists the court's charge with respect to time of death constituted prejudicial error in that it removed from the consideration of the jury the question of reasonable doubt which could have been engendered by the evidence as to the time of death and the non-presence of the defendant at that time.

He sharpens his thrust by asserting the instructions took away from the jury "one of the factual and most important issues at the trial. * * * "

The record is otherwise. In a long, comprehensive charge the court, amongst other things in this respect, said:

" * * * You make your own ultimate judgment of the facts of the case. You recollect yourself what the testimony was in any particular case as to any particular witness. It is your recollection of the testimony by which you are to be guided and not by my recollection or the recollection of either the State or the defendant's counsel."

Again it was charged:

" * * * The time of the killing has been brought into evidence in this case to affect credibility, to affect proofs of the State. You have to consider all the evidence in respect to that testimony in determining that issue of what the doctor said as to the time of death and after he had testified that he concluded that

> the cause of death was due to a total crushing of the skull with a decerebration * * * "

The court then quoted at length from the testimony of the doctor who had performed the autopsy and had made the estimate as to the time of death, reviewing those portions where the witness had pointed out the difficulty encountered in this endeavor because of the cold weather and its effect upon the setting in of rigor mortis, the doctor finally concluding: " * * but with the prevailing weather being as cold as it was, it was very hard to determine when it was exactly."

Following this, the court again charged:

> "Now, you have to consider all the testimony and recollect the testimony in weighing and determining what the facts are, what the credible facts are, and that is an example of it. You cannot just take one piece or one statement or one question and answer from one witness out of context and say that he said so-and-so and so-and-so exactly and precisely. Weigh it all, consider it all and consider all the testimony in the case in making your determination on any of the points that you have to determine."

With the breadth of this charge and the emphasis made by the court, it is difficult to give credence to the accusation that it took anything away from the jury.

*Point III*

> Was the polling of the jury improper and did it deny the defendant his right to an individual poll of each juror?

After the foreman announced the verdict as "guilty of murder in the first degree," the defendant requested a poll of the jury and the court directed it to be taken in the following manner:

"The jury will be polled. The verdict of the jury as announced by the Foreman and recorded by the Clerk, guilty of murder in the first degree, if that is your individual verdict and vote as a juror when your name is called by the Clerk you will answer yes. If that verdict guilty of murder in the first degree as announced by the Foreman as the verdict of the jury and recorded by the Clerk is or was not your verdict as a juror and your name is called you will answer no. Do you understand?"

The foreman replied, "Yes, sir," and the trial judge then directed the clerk to poll the jury. Each juror's name was called by the clerk and each, in answer to his name, said "Yes."

This, the defendant asserts, was contrary to *State v. Cleveland*, 6 N. J. 316 (1951), where we held that upon a poll it was the duty of each juror to indicate clearly whether he found the defendant guilty of murder in the first or second degree, and the jurors in that case not having so expressed, we reversed.

The *Cleveland* case, however, is readily distinguishable because there the degree of murder was not stated either in the question asked or in the answers of the individual jurors.

The instant case is parallel with *State v. Meyers*, supra, where the jurors answered variously "Yes," "Yes, sir," and "It is" to the question put by the clerk to each of them whether murder in the first degree with a recommendation of life imprisonment was their verdict. We held:

"* * * each (juror) expressly indicated that was his verdict. Each juror announced his finding of the defendant's guilt and specified the degree of murder. The right to a poll of the jury * * * was fully satisfied." p. 484.

In *State v. Huff*, supra, as here, after the verdict had been announced, the court said:

"Members of the jury, the court will record your verdict as rendered, guilty of murder in the first degree with recommendation for life imprisonment. The jury will be polled. As each juror's name is polled, if such juror agrees with the verdict recorded, will you kindly respond 'I do.' If you do not agree with the verdict as it is recorded, then kindly respond that you do not agree. The verdict as recorded is guilty of murder in the first degree, with recommendation of life imprisonment."

We approved this formula, saying at page 255:

"This procedure is within our pronouncement in *State* v. *Meyers*, supra, and *State* v. *Vaszorich*, 15 N. J. 99 (1953)."

The manner and the form of the recording of the verdict was in accord with our law as established by previous adjudications. *State* v. *Hunt*, 25 N. J. 514 (1958). Cf. *State* v. *Greeley*, 11 N. J. 483 (1953).

*Point IV*

Was Exhibit S-84 erroneously admitted into evidence as a confession?

The admission of this exhibit was originally objected to by the defendant upon the ground that it was not a confession and therefore the writing itself, as opposed to verbal reports of Smith's statements to the police, was not admissible in evidence. This theory is not advanced in the brief presently before us. The only argument asserted now is that before he made the confession, Smith had never been told of the nature of the injuries from which the victim died and that for this reason the inferences drawn from the confession are unjustified. In other words, counsel insists Smith may have confessed to killing Victoria only because he believed the punch or the slap he had delivered soon after they arrived at the sand pit was the fatal blow.

This argument has no merit. Among other things, it assumes the truth of Smith's testimony that he did not learn what the cause of death had been until sometime around Easter of 1957. Smith, however, admitted he had read the story of the murder in a local newspaper on the afternoon of March 5, 1957, previous to making his confession on the morning of March 6. The State produced the March 5 edition of the paper in question at the trial. The second paragraph of the Zielinski murder story reveals that the girl's skull "had been crushed by a rock." When confronted with the newspaper, Smith offered the weak evasion that "I never take a newspaper to be accurate."

The jury had a right to conclude that defendant was fully cognizant of the cause of Victoria's death at the time he confessed.

Although we have difficulty conceiving the error upon which the defendant actually relies, we will treat the confession as though its introduction had been opposed upon every conceivable legal ground.

The record clearly shows that on the lengthy argument in reference to the exhibit's admissibility the trial court agreed in part with counsel for the defendant, saying there was a difference between a mere statement containing admissions and a confession and that a stenographic transcript of admissions was secondary evidence, hearsay and not admissible. It then defined a confession thusly:

> "Now, a confession, however, is a direct acknowledgment of guilt on the part of the accused and that is the difference between a confession and an admission, and a confession, though unsigned, if acknowledged, read and approved by the confessor, is admissible in evidence as an entity."

After analyzing and quoting a goodly portion of the statement made by the defendant, the court stressed the following paragraph:

> "I went back in. That's when it dawned on me that I had been with her the night before and something snapped in the back of my head that I did it and I knew it in back of my head. I couldn't convince myself."

Again, defendant stated his friend told him, "The place up there is swarming with cops and checking the registration of every Mercury registered in Bergen County," and then:

> "That's when it hit me really hard I must have been the one who really did it."

The court concluded:

> "That in the opinion of the court constitutes a direct acknowledgment of guilt on the part of the accused sufficient in both these instances as admissions of guilt to constitute this document, together with all the other relations in it in respect to the happening, as a confession and, therefore, S-84 for identification is admitted in evidence, as a confession."

A confession made by a defendant need not be signed by him to make the document itself admissible. If it was read over to the accused, or by him, if it was signed or otherwise admitted by him to be correct, it is admissible. *State* v. *Monahan*, 16 N. J. 83 (1954); *State* v. *Cleveland*, *supra*; *State* v. *Foulds*, 127 N. J. L. 336 (E. & A. 1941); *State* v. *Donato*, 106 N. J. L. 397 (E. & A. 1930); *State* v. *Lustberg*, 11 N. J. Misc. 51 (Sup. Ct. 1933); "Admissibility in Evidence of Unsigned Confession," 23 A.L.R. 2d 919.

In *State* v. *Donato*, *supra* at 407-08, deciding an almost identical question, our Court of Errors and Appeals said:

> "* * * But the undoubted rule is that a confession of the accused which was reduced to writing by another person and was read over to or by the accused, and which was signed or otherwise admitted by him to be

correct, is as much his written confession as one prepared entirely by his own hand would be; and when made voluntarily, it is admissible against him. * * * And where, as here, a confession of the accused, made voluntarily, which was reduced to writing by another person, but which the defendant refused to sign, when it was presented to him for that purpose, 'until he sees his counsel' or 'on the advice of counsel' and for no other reason, it was not prejudicial error to admit such written confession, it appearing that the writing was clearly proved, before its admission in evidence, to be entirely accurate, with no evidence—not even a suggestion—that there was any inaccuracy in the writing, although the accused was accorded ample opportunity to make such showing if he could. * * *"

In the same case, the court defined a confession, saying:

"Confessions are admissions, made at any time by a person accused of crime, stating or suggesting the inference that he committed or participated in the commission of that crime. * * * Such are the statements in question." (p. 407).

The statement in the case *sub judice*, in our opinion, was a confession in which the defendant, at least in part, admitted committing the crime charged against him.

Concededly it was voluntary, although the defendant at the trial said he had given untruthful answers.

Whether a statement or confession is voluntary depends upon the facts in each case. The determination of the trial court will not as a rule be disturbed on appeal when there is sufficient evidence to support it. *State* v. *Pierce*, 4 N. J. 252 (1950); *State* v. *Cole*, 136 N. J. L. 606 (E. & A.), cert. den. 334 U. S. 851 (1948).

We see no error in the admission of the questioned exhibit.

## *Point V*

**Was the jury's verdict the result of prejudice, passion or mistake and not founded upon proven facts?**

During the presentation of this argument, the defendant points to certain comments made by the prosecutor during summation and describes them as "other reasons for this mistake, passion or prejudice."

It is not contended we should reverse the conviction simply because the prosecutor's remarks exceeded the bounds of fair play, but it is suggested they be treated as factors which possibly influenced the jury to return a verdict which actually was against the weight of the evidence.

Despite this indirect approach, we have nevertheless completely reviewed the prosecutor's comments and his whole summation and the court's charge to determine whether prejudicial error was committed.

Generally, a prosecutor is limited to commenting upon the evidence and the reasonable inferences to be drawn therefrom. *State* v. *Bogen*, 13 N. J. 137 (1953). But this does not mean that he is precluded from making a vigorous and forceful presentation of the State's case, couched in trenchant terms, and, as said in *State* v. *Vaszorich*, 13 N. J. 99, 119 (1953), "every excursion outside the evidence will not necessarily vitiate a conviction and * * * on the question whether the improper comment shall have that effect, the making by trial counsel of a timely and proper objection and the action of the trial judge in connection therewith are ordinarily controlling considerations." See *State* v. *Huptmann*, 115 N. J. L. 412 (E. & A.), cert. den. 296 U. S. 649 (1935); *State* v. *Terry*, 91 N. J. L. 539 (E. & A. 1918).

Although numerous remarks of the prosecutor are now called to our attention and claimed to have been prejudicial, the record shows that only one was objected to, in a somewhat subdued manner, at the trial. The prosecutor said:

"The people of this county are looking to this jury. Shall the teenagers of this county, the school girls of this county walk the streets without fear?"

"Mr. Selser: Of course, if your Honor please, this is a very unhappy moment.

"Mr. Calissi: You can object if you want.

"Mr. Selser: I think it is unfair comment and I ask counsel be instructed not to pursue it and your Honor to instruct the jury not to consider it.

"The Court: Let us keep the whole case within the confines of this room and this evidence."

Following this, the prosecutor continued:

"I again repeat to you that the eyes of Bergen County, especially, are now on this jury. I ask you to do your sworn duty."

But no further reference was made to "teenagers" and to "school girls," the mention of whom apparently caused defendant's objection.

In its charge, the Court specifically instructed the jury as follows:

"Remarks of counsel in the course of trial outside the scope of the evidence, in the argument of points of law or evidence with the Court in the presence of the jury, or in summation, as the remark of the Prosecutor, 'The eyes of Bergen County are upon you,' have no place in the trial and shall not be considered by the jury in their consideration and deliberations. You are to determine the issue solely on the evidence in the case and the law as the Court charges it, with no consideration at all as to whose eyes are upon you. It is the eyes of your own conscience that you make a proper judgment according to your oath without any consideration of who else is concerned but the parties to this litigation. Let no extraneous matter enter into

your deliberations. Your verdict in this case is not to be influenced by anything but the evidence and the law of the case. This is your twelfth trial day and the testimony, exhibits and law as charged today does not permit the delay or distraction of consideration or discussion of extraneous matters. Do not permit your fellow jurors in that room to raise or discuss anything outside of the evidence and the law of this case. Do not raise or discuss what happened to someone else somewhere else at some other time, what may have happened to some relative or somebody of yours, something you have read about or seen about in your reading. Those are extraneous matters and have no part in your deliberation or determination of this case. You have sufficient evidence in this case and sufficient law to take all your time on just the law and the evidence of this case in making your determinations."

In *State* v. *Bucanis*, 26 N. J. 45, 56 (1957), we announced:

"* * * we must not be so idealistic as to close our eyes to the realities of human nature as they are continually portrayed during our trial process. Each criminal trial is a swiftly moving dramatic contest which often evokes strong emotions in the participants. The charged atmosphere created frequently makes it arduous for the prosecuting attorney to stay within the orbit of strict propriety.

"We have necessarily held, therefore, that not every suspected deviation from perfection on the part of a prosecutor will justify a reversal of a conviction. Before such a result ensues, his infraction must be clear and unmistakable and must substantially prejudice the defendant's fundamental right to have the jury fairly evaluate the merits of his defense."

Having made a complete survey of all the challenged remarks made by the prosecutor, in their full context, as

they relate to the testimony in the case, and considering the failure of the defendant's attorney in all excepting one instance to note an objection, plus the emphatic and impressive direction of the Court that the issues should be decided solely on the evidence as presented, we must necessarily determine that a reversal is not warranted upon the ground that the prosecutor's remarks caused a miscarriage of justice or brought about a verdict which was the result of mistake, partiality, prejudice or passion.

Defendant contends the jury's verdict was "not founded upon proved facts." We are convinced, however, that the accumulation of evidence was more than sufficient to justify a finding of guilt beyond a reasonable doubt. Clearly, defendant's conviction was warranted.

The State's theory of how the murder occurred, as supported by the record, is that Smith and Victoria Zielinski drove into the sand pit sometime between 8:30 and 9:00 p.m. on March 4, 1957. Soon after they had arrived, Smith began to force his attentions upon the girl. He lifted up her sweater and, when she resisted, tore the right side of her brassiere from her bosom. He then bit her upon the right breast.

She struggled out of the car, screaming that she was going to tell her father, and ran up the dirt road and out of the sand pit. Fearful that she would disclose his sexual advances to her family, Smith seized a baseball bat from the back of the car, jumped out and began to chase her, losing his shoe in the process. He caught her a short way up Fardale Avenue from the sand pit and struck her with the baseball bat; dislodging some of her hair, which fell to the ground in a bloody clump. On Fardale Avenue, she lost one loafer and the kerchief which she was wearing upon her head.

Smith threw the bloody bat into the woods near the intersection of Fardale Avenue and Chapel Road. He dragged her unconscious or stunned body back into the sand pit and onto the top of the dirt mound. He viciously

crushed her head with rocks and dumped the lifeless body over the edge of the mound.

Returning to Gilroy's automobile, he hurriedly fled from the scene, in his anxiety leaving his shoe behind. He stopped on Chapel Road just long enough to throw Victoria's pocket book and school books into the woods. When he arrived home he washed up and subsequently went back to the scene of the crime in order to retrieve the incriminating shoe. Later, he endeavored to conceal his bloody shoes, socks and trousers.

Smith's confession contains direct admissions of guilt, *i.e.*, "That's when it really hit me hard I must have been the one who really did it." Every fact he related therein confirms the State's version of the crime. At the trial, he attempted to nullify the compelling effect of the confession by maintaining he had lied in order to avoid implicating D. H. who had threatened his family. This explanation verges upon the incredible.

Before making his confession, Smith requested and received an opportunity to confer with a spiritual advisor. He admitted stating to the police early in his interrogations that if they wanted a "fall guy" they should "grab D. H." This statement somewhat belies his subsequent contention that he falsified his confession through fear of the retribution D. H. would wreak on his, Smith's, family if Smith involved D. H. in the crime. Were he truly in fear of D. H., he would not have urged the police to seek out and arrest the latter. Moreover, Smith admitted giving "substantially" the same confession to three doctors who had interviewed him previous to trial, while he was in jail.

Smith testified D. H.'s threat was delivered on Main Street in Ramsey at approximately 9:20 p.m. on the night of March 4. D. H. stated he did not see Smith at all on the night of March 4 and that at 9:20 p.m. he was in a tavern a number of miles away. A friend of both D. H. and Smith confirmed D. H.'s presence in the tavern at the time in question. Furthermore, according to Smith's story at

trial, D. H. must have appeared at the same pit between 8:30 and 9:00 p.m. Yet the pharmacist at the drugstore where D. H. worked testified D. H. was sent to pick up merchandise at another drugstore in Ridgewood, a sixteen to twenty-minute trip according to one of the officers who clocked it, at 8:55 p. m. and returned shortly before 9:00 p. m. with the right package, not leaving the store again until shortly after 9:00 p. m. The combined and impressive testimony of D. H.'s "alibi" witnesses is totally incompatible with defendant's position that D. H., not he, killed Victoria.

Additionally, all of the incontrovertible physical facts point to defendant's guilt, as do his actions after his admitted struggle with Victoria.

His footprints were discovered near the mound of dirt although he denied being back in that vicinity. Both of his shoes were stained with blood. The tongue of one was missing and both soles had been partially removed. His socks and trousers were also heavily impregnated with blood. An analysis disclosed that the blood on defendant's clothing was the same type as that covering Victoria, but a different type from defendant's. The chemist and toxicologist who appeared for the State testified the stains on Smith's left trouser leg were caused by "splashing", as revealed by their disconnectedness and "dumbbell appearance."

Smith attempted to account for the stains by explaining that they had gotten onto his clothing when he examined Victoria's head wound after she returned to the sand pit with D. H. The number, richness and location of the stains refute this explanation.

It is not disputed that the baseball bat was in the back of Gilroy's car when Smith borrowed it, and the same bat was later recovered near the scene of the crime, covered with blood. Significantly, bloodstains were found on the front seat of Gilroy's car on the driver's side and not on the passenger's side where Smith claimed to have placed

Victoria, intending to take her to the hospital, before D. H. pulled her out of the car.

The defendant, at various times, gave several different explanations of how he received the cuts and contusions on his knees. The jury was justified in concluding they were sustained when he fell while chasing Victoria.

Defendant's conduct and general demeanor reflected a noticeable consciousness of guilt. He testified he was not particularly perturbed and did not leave the sand pit in a hurry after his encounter with D. H. and Victoria. Yet, he drove off in sub-freezing weather without his shoe, which he claimed had come off right by the car when he jumped out upon seeing two figures approaching. There is no consistency between this act and the story he told at trial.

Why did Smith inform Gilroy that he had vomited on his trousers and had had to throw them away when he was driving back to the trailer with Gilroy on the night of March 4? Would a clear conscience have dictated an attempt to conceal Victoria's books and handbag and his own bloodstained socks and trousers in the woods? Normal conduct would have been to drop the socks and trousers into the garbage can outside the trailer and to return the books and pocketbook at a later date.

Smith testified he had thrown his shoes away after taking them, on March 5, 1957, to a shoemaker in Ramsey who had informed him they were not worth repairing. This was not corroborated by the shoemaker, whose absence was unexplained.

Turning to Smith's most important contention, he makes much of the fact that the Bergen County Medical Examiner initially estimated the time of death as being in the neighborhood of 12:00, or 1:00 a.m. on March 5. Actually, however, as has already been indicated, the examiner testified that because of the winter weather the time when death occurred could not be accurately fixed; "It could have been earlier than 11 o'clock. The jury was entitled, on the evi-

dence submitted, to conclude, as it did, that only defendant could have given the exact moment of death.

All the facts and circumstances proven or admitted by the defendant, taken in their natural sequence, attributing to them only their normal import and weight and excluding all except their logical and credible inferences, circumscribed by caution and a realistic approach, produce a vivid consciousness of guilt justifying the jury's verdict.

A reading of the record firmly and impressively convinces the impartial mind of the truth of the charge made against the defendant beyond a reasonable doubt.

The crime involved is not pleasant now is the punishment inflicted, but such is the law as it stands upon our books, vigorously and challengingly upheld by the trial jury. The record leaves no room to disturb the jury's findings. Our conclusions support it.

The judgment of conviction is affirmed.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1958

**Appellate No. 264**

EDGAR SMITH,

*Petitioner,*

*vs.*

STATE OF NEW JERSEY,

*Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1958

**Appellate No. 264**

EDGAR SMITH,

*Petitioner,*

*vs.*

STATE OF NEW JERSEY,

*Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

### I

### Reference to Official Reports of Opinions Delivered in the Court Below*

The petitioner's reference to the opinions below is correct.

* Unless otherwise plainly indicated by the context, numbers in parentheses throughout this brief, refer to pages of the printed joint appendix record used on the appeal from the conviction below. Numbers preceded by the letters (MA) refer to pages of printed joint appendix record used on the appeal from the denial of the motion for a new trial below.

## II

## Counter-Statement Concerning Jurisdiction

Counsel for petitioner states (Petition, p. 1) without elaboration that jurisdiction is invoked and authorized by 28 U.S.C., Section 1254(1) and 28 U.S.C. 1257(3).

We respectfully submit that the decisions of the Supreme Court of New Jersey in this case involve no State statute repugnant to the Constitution of the United States; no title, right, privilege, or immunity was specially set up or claimed under the Constitution of the United States, nor did the said Court decide any federal question of substance not heretofore determined by this Court or contrary to the applicable decisions of this Court.

We further respectfully submit that the decisions below are in conformity with the provisions of the Federal Constitution[1] respecting due process and equal protection of the laws as guaranteed by the United States Constitution and represent no departure from the applicable decisions of this Court.

We, therefore, respectfully submit that this Court should not entertain jurisdiction and issue a writ of certiorari to review the decisions of the Court below.

## Counter-Questions Presented

**A. As to the appeal of the conviction below.**

1. Whether the enlarged color photographs were properly verified and authenticated prior to their admission in evidence?

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[1] Constitution of the United States, Amendment XIV, Section 1.

2. Did the Court's charge to the jury accurately state the law or was it erroneous, resulting in manifest injury to the defendant in that:

(a) It improperly stated the law as to the length of time involved in deliberation and premeditation;

(b) It failed to properly inform the jury that lack of evidence might be taken into account in determining whether reasonable doubt existed as to defendant's guilt;

(c) Did not properly distinguish between first and second degree murder;

(d) Limited the jury's consideration of the element of "time of killing" to credibility and to the testimony of one of the State's witnesses only.

3. Was the polling of the juror improper and did it deny the defendant his right to an individual poll of each juror?

4. Was Exhibit S-84 erroneously admitted into evidence as a confession?

5. Was the jury's verdict the result of prejudice, passion or mistake and not founded upon proven facts?

6. Whether the foregoing questions raise issues reviewable by the United States Supreme Court?

**B. As to the appeal of the denial of motion for a new trial below.**

1. Whether there was an abuse of discretion in holding that the alleged newly discovered evidence failed to meet the test required to be met to entitle defendant to a new trial?

2. Is a motion for a new trial a trial within the meaning of State and Federal Constitutions requiring the presence of the defendant thereat?

## III

### Counter-Statement of the Case

The petitioner, Edgar Smith, was tried and convicted of murder in the first degree (977a-27 to 32). The mandatory sentence of death followed (988a-14 to 22) from which defendant appealed to the Supreme Court of New Jersey (1127a). Its opinion affirming the conviction below is reported in 27 N. J. 433 (1958).

The crime was the killing of Victoria Zielinski, a schoolgirl aged 15 years (27 N. J. 433, 436).

On March 4, 1957 at 7:30 p.m., in the company of her sister Myrna, the deceased, Victoria Zielinski, left her home to go to the home of her girl friend Barbara Nixon (196a-17). They walked down Wyckoff Avenue in the direction of Mahwah (196a-28 to 31). Myrna left the deceased about two houses before the Nixon home (196a-33) and walked back home, a distance of about one-half a mile (196a-40 to 197a-8).

It had been arranged that Myrna would leave the Zielinski home at 8:30 p.m. and that Vickie would leave the Nixon home simultaneously and meet at a halfway point (197a-35 to 38). Myrna became engrossed in her homework and left her home at 8:40, ten minutes late (197a-28 to 34). Myrna never met Vickie (197a-40). Myrna walked to the Nixon home arriving there about 8:50 p.m. (198a-9), stayed there about five minutes to ask about Vickie (198a-12) and then started home (198a-15). On the way home between 9:05 and 9:40 p.m. (198a-38) Myrna saw Don Hommell drive by in the direction of Ramsey at

a very fast speed (198a-18 to 34). No one was in the car with him (212a-37 to 40). Myrna arrived home at 9:10 p.m. and told her parents that she had not met Vickie (199a-5).

Mr. Anthony Zielinski was awakened by his wife a 12:30 a.m. that evening (236a-16). He got dressed and with his daughter Mary went to look for Vickie. They met some police on Wyckoff Avenue (238a-5) and then went to a milk bar in Ramsey (238a-18). They came home at 1:00 a.m. without success (238a-22). Later Mr. Zielinski with and without his wife, unsuccessfully searched for Vickie at the Nixon's (238a-30), on Wyckoff Avenue (238a-40) and at Pellington's on Route #17 (239a-15).

Mr. Zielinski continued his vigil until daybreak at which time he and his wife went again towards the Nixon home (239a-30). They saw the Nixons and asked if Vickie was there (239a-38). They returned to their home and then searched the various streets (240a-26 to 34). On Fardale Avenue Mr. Zielinski found his daughter's black loafer (240a-36). He stopped the car and from the window he saw a kerchief or bubushka about twenty feet further (241a-7 to 10). After sending his wife for the police, Mr. Zielinski went across the road over a wall and searched the brush (242a-25 to 29). When Mr. Zielinski returned they went across Chapel Road to the sand pit (242a-32) where Mr. Zielinski discovered a pair of red gloves (242a-35). He returned to the car in time to meet the police (243a-38). With the police, they searched both sides of the road and into the sand pit (244a-10). There Mr. Zielinski saw stones covered with blood (244a-24) and on the top of the mound a shoe, locket and brains scattered seven or eight feet along the bank (244a-37 to 245a-8). He looked over the bank and saw his daughter's body in a jack-knifed position (245a-9). Her sweater was pulled over her shoulders, one stocking was off, there was a hole

in the back of her head (245a-18 to 26) and the brassiere was off, hanging down exposing her breast (232a-28 to 40).

Subsequent examination disclosed that there were teeth bites around the deceased's right nipple in the areola area (511a-33 to 38).

Thereafter, Joseph Gilroy, aroused by suspicious stains on the seat and floor of his car, which he had loaned to the defendant, reported this fact to the police (383a-10 to 35; 418a-23 to 32).

Detective Graber, with other officers, went to Ridgewood were they picked up the defendant at his mother-in-law's home (419a-33 to 420a-4).

Smith was taken to the Mahwah Police Headquarters (420a-15) and interrogated. After interrogation, Smith went with Detective Graber and others to Mechanic Street in Ramsey where he showed them a garbage can (1060a) in which he had thrown away his shoes (420a-24 to 29). The shoes (Exh. S-72, 422a-32) were an exact duplicate (605a-28) of the plaster cast impression (Exh. S-75, 469a-36) made at the scene of the crime (469a-24 to 30). The shoes were found to be stained with blood of human origin (601a-8 to 20).

Later, the defendant Smith was taken to the gravel pit where he claimed he had been sick and thrown up (422a-37 to 423a-7). A search disclosed no evidence of defendant having thrown up (423a-7 to 10). In addition to searching this area, the detectives, with the defendant, searched an area along Pulis Avenue where defendant said he had thrown his pants (424a-23 to 40) and along Wyckoff Avenue where defendant claimed he had first thrown up (425a-13 to 17) without success (424a-29; 425a-18 to 20).

Subsequently, the defendant was taken to the Prosecutor's Office where he was further interrogated by Detective DeLisle (519a-10). During the course of the questioning, Smith broke out crying (519a-20 to 25). He was given a cigarette and water (519a-27). He asked to see a certain priest (519a-29) and after regaining his composure, he related of his meeting with the deceased, Vickie, and of some of the occurrences at the pit (519a-30 to 520a-4).

After he had seen the priest, the defendant gave a statement under oath (527a-29 to 35) in the presence of the police authorities and a member of the jury panel (517a-28 to 518a-13; 543a-26 to 544a-30).

The statement (Exh. S-84, 1072a to 1111a) was taken at the Prosecutor's Office (531a-8) by Arthur J. Ehrenbeck, an official stenographic reporter on March 6, 1957 (530a-34 to 40) and continued while going to and at the scene of the crime (531a-25 to 30). It was given by the defendant voluntarily without threat, promise or violence (532a-4 to 10; 544a-10 to 35) in the presence of several officers (531a-15 to 20) and a juror (543a-26) after defendant had consulted with his priest (485a-13 to 20). In fact, defendant's counsel admitted that it was voluntary (532a-30 to 35) although the Court permitted him thereafter to present testimony as to the question of voluntariness since the stipulation was made prior to reading the statement (537a-37 to 538a-40).

After some preliminary questions pertaining to name and address (1072a-40) and introductions (1073a-6 to 15) the defendant was advised that he was going to be asked "some questions" "concerning an incident that occurred in Mahwah and one Vickie Zielinski" (1073a-16). He stated that he was willing to give a voluntary statement concerning the incident, under oath (1073a-18 to

21). He proceeded to describe the incidents of the morning in question; how he went bowling (1074a-34); that he borrowed Gilroy's Mercury (1075a-31 to 40); bought some kerosene (1076a-13) and went home to light the heater (1076a-16 to 19).

He described how he met his wife and mother-in-law at his trailer (1076a-24 to 28) and that he then went to Segor's in Ramsey to get some more kerosene around 8:20 or 8:30 p.m. (1076a-26 to 33). After getting the kerosene he started back by way of Wyckoff Avenue (1076a-37 to 40) and met Vickie Zielinski whom he recognized (1077a-4 to 8). She waved (1077a-10), defendant stopped, turned around and picked her up at about 8:40 (1077a-12 to 22). Defendant proceeded in the direction of Vickie's home, but at her suggestion started to go around the block (1077a-23 to 35). When he reached the sandpit, however, he pulled into it (1077a-35 to 1078a-4) of his own accord (1103a-8). There a discussion ensued about Vickie having cut school (1078a-7 to 16). Vickie said she was going to get out and walk home (1078a-17); that she was going to tell her father (1078a-18; 1094a-20 to 24); that she was going to tell her father that he (Smith) was like the rest of the boys (1078a-20; 1094a-21 to 27; 1097a-26). As Vickie started to get out of the car, defendant grabbed her arm or jacket (1078a-25 to 28; 1094a-36). Defendant was off balance (1078a-36 to 1079a-4; 1095a-4) and Vickie was able to pull herself out of the car, pulling defendant with her (1079a-4; 1095a-4 to 10). She started swinging at defendant and slapping (1079a-9; 1095a-16; 1097a-40). Defendant let go of her hand and swung his right hand in her direction (1079a-12); he "swung hard" —"as hard as he could" (1098a-4 to 8). He didn't know whether he struck her more than once (1095a-24) nor did he know if he struck her with an article other than his fist (1092a-25). His hand, however, didn't hurt (1079a-

15; 1098a-9). He remembered running (1079a-24); running or chasing somebody (1091a-38); he remembers running possibly down the road (1104a-6), Fardale Road (1103a-14). He got back in the car alone (1079a-40). He knew that Vickie wasn't with him, he was alone, but it seemed natural (1105a-4 to 10). By the time he got into the car he had "completely forgotten about the whole thing. It wasn't in (his) mind at all. Just like it never happened" (1082a-28 to 30). He started to back the car out, he couldn't see where he was going (1080a-6). He headed south on Chapel Road and stopped (1080a-4 to 7). He had Vickie's books and pocketbook when he left the sandpit and his recollection was that he probably threw them away when he stopped (1080a-25 to 33). He realized he had only one shoe on when he got to his home (1080a-39) and that his pants, which he took off, had blood all over them (1080a-40). After changing, he picked up the bloody pants and got back into the car, taking a twelve volt lantern with him (1081a-25 to 33). He drove down Chapel Road back to the sandpit (1081a-32), parked the car and walked into the sandpit with the lantern (1082a-4 to 6). At the end of the road he found his shoe which he picked up (1082a-7). He saw a red glove or mitten there, but he just kicked it (1082a-10). He then proceeded to Gilroy's home and between Chapel Road and Gilroy's, he threw his pants out (1082a-13 to 19).

The next morning he heard a news broadcast which reported that a girl, Victoria Zielinski had been killed in Mahwah the previous night (1083a-26 to 38). He got curious, something was snapping in the back of his head and he didn't know what it was that he should recall (1083a-40 to 1084a-5). He listened to the twelve o'clock news and heard the bulletin (1084a-11). Then the defendant related what occurred when he called Gilroy (1084a-19):

"* * * I asked him if he had heard anything on the radio and he said no. I remember the exact words I used.

"I said, 'Some broad from Ramsey got killed.'

"I said, 'It sounds like Vickie but, I don't know, the name on the radio didn't sound right.'

"He said something like, 'To hell with it. I will be down later' something like that.

I went back in. *That's when it dawned on me that I had been with her the night before and something snapped in the back of my head that I did it and I knew it in back of my head.* I couldn't convince myself." (Italics supplied.)

Defendant related later that Gilroy and another fellow—Don Hommell, came to pick him up (1085a-10) and that (1085a-13).

"First thing I said when I come out of the house, I said to this fellow Don, I said 'Was that Vickie that got killed?' *I guess I was actually asking as if I didn't know myself*, and he said, 'Yeah.'

He said, 'The place up there is swarming with cops and checking the registration of every Mercury registered in Bergen County.'

*That's when it hit me really hard I must have been the one who really did it.*" (Italics supplied.)

Defendant then related that he threw away his shoes in a convenient garbage can (1085a-27) and that that evening he was picked up by the police (1086a-17).

At the scene of the crime, the defendant pointed out the spot on Wyckoff Avenue where he picked up Vickie Zielin-

ski (427a-7 to 20); he described what had happened (428a-24 to 33); his running around and his leaving the gravel pit (428a-34 to 38). He directed the police to a point south on Chapel Road where he told them to stop (428a-40 to 429a-5). In the field across the road were found the pocketbook and school books of the victim (429a-8 to 11; Exh. S-74, 1064a).

The defendant's pants (Exh. S-78, 505a-31) were found on Oak Street (502a-20; Exh. S-80, 1066a). In the pockets thereof was found a pair of socks (505a-34 to 40; Exh. S-79, 506a-6). Both the pants and socks were stained with human blood type "O" (602a-16 to 21), the same blood type as was found on the victim's sweater (602a-20), jacket (602a-30), bra (603a-33 to 40), gloves (604a-4 to 13), and scarf (606a-24 to 30).

Subsequently, a baseball bat (Exh. S-69, 385a-25) which had been in the back of the car of Gilroy (385a-20) was found fifty feet east of Chapel Road and 106 feet south of Fardale Avenue (406a-14 to 41). It, likewise, was ingrained with blood (605a-33 to 39).

After the appeal of his conviction was affirmed by the Supreme Court of New Jersey, 27 N. J. 433 (1958), Smith petitioned the trial court for a new trial on the grounds of alleged newly discovered evidence. Appeal to the Supreme Court of New Jersey followed the denial of the motion, resulting in an affirmance by the Supreme Court of New Jersey, 29 N. J. 561 (1959).

The petition for writ of certiorari to this Court followed a stay of the sentence of death by Mr. Justice WILLIAM J. BRENNAN for this Court on June 19, 1959.

## IV.

## Summary of the Argument

We respectfully submit:

FIRST: No federal question was ever raised or presented for decision to the Supreme Court of New Jersey on the conviction appeal, but on the contrary, the record affirmatively shows that the appeal was decided on non-federal grounds.

(a) The question whether defendant was denied due process of law under the Fourteenth Amendment not having been raised at the trial or on the appeal, and not having been passed upon by the New Jersey Supreme Court, this Court should not entertain jurisdiction to review the case. *Hedgebeth* v. *North Carolina*, 334 U. S. 806, 807 (1948); *Loftus* v. *Illinois*, 337 U. S. 935 (1949); *Stembridge* v. *Georgia*, 343 U. S. 541, 457 (1952); *Durley* v. *Mayo*, 351 U. S. 277, 281 (1956); *Black* v. *Cutter Laboratories*, 351 U. S. 292 (1956).

It does not appear on the record that any title, right, privilege, or immunity was specially set up or claimed at the proper time in the proper way so as to require this Court to entertain jurisdiction to review the State Court decision. *Spies* v. *Illinois*, 123 U. S. 131, 181 (1887); *Brooks* v. *Missouri*, 124 U. S. 394 (1888); *Harding* v. *Illinois*, 196 U. S. 78 (1904); *Edelman* v. *California*, 344 U. S. 357 (1953), but rather does it appear that the decision rests on well settled non-federal grounds in conformity with the State Court decisions. *State* v. *Cleveland*, 6 N. J. 316 (1951); *State* v. *Monahan*, 16 N. J. 83 (1954), cert. den. 348 U. S. 889 (1954).

(b) The questions now raised pertaining to the trial Court's charge, the prosecutor's summation, the admission into evidence of colored photographs, and the alleged inadequacy of trial counsel were never claimed to be in violation of the Federal Constitution, nor were they so presented or passed upon as such by the highest Court of New Jersey, and in any event, they present no federal question.

SECOND: The undisputed facts contained in the record establish beyond question that the confession admitted into evidence was given voluntarily without threats, promises, or physical or mental coercion, and in accord with the fundamental fairness required by the Fourteenth Amendment. Its admission into evidence was in accord with the law of New Jersey and in so deciding, the New Jersey Supreme Court decided no federal question.

THIRD: The ruling of the trial Court and the affirmance thereof by the Supreme Court of New Jersey on the appeal from the denial of a new trial presents no federal question, nor is the holding that petitioner's presence was not required at the hearing of the motion for a new trial in violation of the Federal Constitution, especially where petitioner made no request to appear, was represented by counsel, and it appeared conclusively that petitioner had no pertinent information to present which could in any way have affected the result.

## Preliminary Statement

In view of the fact that petitioner has lumped together in his questions presented for review those which allegedly arose on the appeal of the conviction (1 to 9) which we

contend were neither raised, presented or passed upon by the Supreme Court of New Jersey, with those which allegedly arose on the motion for a new trial (10 to 11), we discuss Points I to IV separately from Point V.

## V

## The Argument

### POINT ONE

**No federal question was ever raised or presented for decision to the Supreme Court of New Jersey on the appeal of the conviction below, but on the contrary, the record affirmatively shows that the conviction appeal was decided on non-federal grounds.**

**A. The question whether defendant was denied due process of law under the Fourteenth Amendment by the admission into evidence of his confession was never raised at the trial or on the appeal of the conviction below and was not passed upon by the Supreme Court of New Jersey which rested its decision on non-federal grounds.**

The petitioner urges as a ground for review (Point I, Petition, pp. 13 to 48) an alleged denial of due process under the Fourteenth Amendment of the United States Constitution in the admission into evidence of the confession of Edgar Smith.

The basis of such contention is grounded in the alleged improper:

1. Taking of the statement while held incommunicado for upwards of twenty (20) hours through a freezing cold night;

2. Around-the-clock prolonged and massive inquisition by dozens of officials without counsel, no sleep, no rest, little food, and scant clothing;

3. Lack of advice as to his constitutional right to remain silent and right to counsel;

4. Failure to arraign; and

5. Trickery and cajolery in attempting to get petitioner to sign the confession by a stealthily unauthorized visit to his prison cell.

Aside from the fact that every one of these contentions is completely without support in the record (as we show below), it is significant that nowhere does petitioner point out that the same was raised at the trial, on the appeal, or presented to the New Jersey Supreme Court for decision and passed upon by said Court (Rule 23(f) of Rules of the Supreme Court of the United States).

Studiously petitioner has avoided any reference to this essential element to the jurisdiction of this Court and for a good reason. The record affirmatively shows that none of these questions were raised either in the trial or appellate courts and of necessity therefore they were never presented for decision to the Supreme Court of New Jersey.

Thus, at the trial when the confession was first offered (532a-20) the following colloquy took place (532a-31):

"Mr. Calissi: Is there any doubt in Mr. Selser's mind that this statement was not given voluntarily?

Mr. Selser: No, there is no doubt in my mind at all, and I am sure it is an accurate transcript because I know the stenographic reporter and I know his skills."

After counsel for petitioner was given an opportunity to read the statement and a recess taken to the following day

for that purpose (533a-10), the objection to the statement was not grounded in any Federal Constitutional grounds of lack of due process or on its being extracted by physical or mental coercion, threats or promises without counsel, inordinate delay in arraignment, massive interrogation without sleep or food, or trickery as here claimed, but rather on the sole ground that under State law the statement as such was not a confession and therefore not evidential (534a-7). Counsel for defendant reiterated, "I do not deny the statement" (535a-27) and declared that in any event, he would like to call Smith with regard to the statement for the purpose of testifying with regard to the circumstances preceding the taking of the statement up to the time of its taking (537a-27).

The Court permitted counsel to present testimony as to voluntariness of the confession by reopening that issue despite the stipulation that it was voluntary (538a-33 to 39) and Smith testified as to the circumstances of the taking of the statement.

After such testimony by Smith (his testimony is illuminating since even he did not contend that threats, promises or coercion, physical or mental, was exerted upon him, or that request for counsel was denied or that he was held incommunicado (539a to 542a)) counsel made no objection as to voluntariness of the confession, insisting only that the statement was not a confession. The Court found the confession to be voluntary (545a).

On appeal to the Supreme Court of New Jersey, 27 N. J. 433 (1958) the court pointed out, at page 457:

> "The admission of this exhibit was originally objected to by defendant upon the ground that it was not a confession and therefore the writing itself, as opposed to verbal reports of Smith's statements to the police, was not admissible in evidence. This theory is

not advanced in the brief presently before us. *The only argument asserted now is that before he made the confession Smith had never been told of the nature of the injuries from which the victim died and that for this reason the inferences drawn from the confession are unjustified.* * * *" (Italics supplied)

More importantly, the Supreme Court of New Jersey pointed out, at page 459:

"Concededly it was voluntary, although the defendant at the trial said he had given untruthful answers."

From the above, it is plainly manifest that violation of the due process clause of the Fourteenth Amendment of the United States Constitution in the taking of the confession was never contended for or raised in the trial or appellate courts of New Jersey, never presented for decision to the highest court of the State, nor passed upon or necessary to its decision which rested solely upon independent non-federal grounds.

Under the circumstances here presented, the law is clear that the Supreme Court of the United States will not review a decision of a State court unless it affirmatively appears from the record that the federal question was presented to the highest court of the State and that its decision of the federal question was necessary to its determination of the cause. *Hedgebeth* v. *North Carolina*, 334 U. S. 806, 807 (1948); *Loftus* v. *Illinois*, 337 U. S. 935 (1949); *Stembridge* v. *Georgia*, 343 U. S. 541, 547 (1952); *Durley* v. *Mayo*, 351 U. S. 277, 281 (1956); *Black* v. *Cutter Laboratories*, 351 U. S. 292 (1956).

It must appear on the record that such title, right, privilege, or immunity was "specially set up or claimed" at the proper time in the proper way before jurisdiction to review the State court decision will be entertained. *Spies*

v. *Illinois*, 123 U. S. 131, 181 (1887); *Brooks* v. *Missouri*, 124 U. S. 394 (1888); *Mutual Life Ins. Co.* v. *McGrew*, 188 U. S. 291 (1903); *Kipley* v. *Illinois*, 170 U. S. 182 (1898); *Harding* v. *Illinois*, 196 U. S. 78 (1904); *Mallett* v. *North Carolina*, 181 U. S. 589 (1901); *Jacobi* v. *Alabama*, 187 U. S. 133 (1902); *Hulbert* v. *Chicago*, 202 U. S. 275 (1906); *Missouri Pacific Railroad Co.* v. *Hanna*, 266 U. S. 184 (1924); *Kelley* v. *Oregon*, 273 U. S. 589 (1927); *Whitney* v. *California*, 274 U. S. 357, 360-61 (1926); *Lynch* v. *New York Ex Rel. Pierson*, 293 U. S. 52 (1934); *Edelman* v. *California*, 344 U. S. 357 (1953); *United States Ex Rel Mayo* v. *Burke*, 93 F. Supp. 490 (D. C. Pa. 1950), affirmed 185 F. 2d 405 (C. A. 3, 1950), cert. den. 341 U. S. 922 (1951), reh. den. 341 U. S. 943 (1951).

Thus, in *Spies* v. *Illinois*, *supra*, 123 U. S. 131, 181 the Court pointed out:

> "To give us jurisdiction * * * because of a denial by the State court, of any title, right, privilege or immunity claimed under the Constitution, or any treaty or statute of the United States, it must appear on the record that such title, right, privilege, or immunity was 'specially set up or claimed' at the proper time in the proper way. * * *. As the supreme court of the State was reviewing the decision of the trial court, it must appear that the claim was made in that court, because the supreme court was only authorized to review the judgment for errors committed there, and we can do no more."

Applying that rule to this case, we find that at the trial no title, right, privilege or immunity was specially set up or claimed under the Constitution, laws, or treaties of the United States. Thus, when the testimony of McCullough was offered, the admission of which is now assigned for error, the objection made

was not that its admission would be a violation of any provision of the Constitution or laws of the United States, but because it was 'incompetent and irrelevant,' coming as it did from a man who, by his conduct in procuring the statements from the defendant as to which it was proposed he should testify, had shown himself to be unworthy of belief in a court of justice, and because 'The witness has shown that he held out an inducement, a promise, to the defendant for his statement, which renders it incompetent.'"

The Court concluded (31 L. ed., p. 457):

"These are all the assignments of error which relate to the rulings in the progress of the trial, and they fail entirely to present any questions of federal law for our consideration. So far as appears, the trial court in its decision was governed exclusively by the Constitution and laws of the State; and the Supreme Court in its opinion on this part of the case, which is in the record, makes no mention whatever of any claim of right under the Constitution or laws of the United States."

Nor may petitioner raise these questions for the first time in this Court, since the same would not be properly in issue here. *Michel v. Louisiana*, 350 U. S. 91, 101 (1955); *New York Ex Rel Rosevale Realty Co. v. Kleinert*, 268 U. S. 646 (1925).

What we have said above with reference to the confession is similarly applicable to the contention of petitioner that the prosecutor furtively and unlawfully visited petitioner in jail to gain an acknowledgment of the confession (Petition, pp. 44-46). At no time was it contended by petitioner that he was deprived of due process of law in violation of the Fourteenth Amendment to the Federal

Constitution. As previously pointed out, *supra*, his sole contention was that the statement was not an acknowledgment of guilt, and thus not admissible as a confession.

Aside from the above, the trial court's determination that the confession was admissible because it had been read over by petitioner and admitted to be correct, was in accordance with the established law in this State and was not a decision of a federal constitutional question.

The law in New Jersey, long established, is that a statement made by a defendant need not be signed by him to render the same admissible. All that is required is that the statement be read over to or by the accused and that it be signed or otherwise admitted by him to be correct. *State* v. *Donato*, 106 N. J. L. 397 (E. & A. 1930); *State* v. *Lustberg*, 11 N. J. Misc. 51 (Sup. Ct. 1933); *State* v. *Foulds*, 127 N. J. L. 336 (E. & A. 1941); *State* v. *Cleveland*, 6 N. J. 316 (1951); *State* v. *Monahan*, 16 N. J. 83 (1954), cert. den. 348 U. S. 889 (1954); 23 *A.L.R.* 2d 919 "Admissibility in Evidence of Unsigned Confession".

That the Supreme Court of New Jersey rested its decision upon this non-federal independent ground is without question. 27 N. J. 433, 458-459 (1958).

**B. The questions now raised pertaining to the trial Court's charge, the Prosecutor's summation, the admission into evidence of colored photographs, and the alleged inadequacy of trial counsel were never claimed to be a violation of the Federal Constitution, were never presented to or passed upon as such in the highest court of New Jersey, and in any event, present no federal question.**

The petitioner now urges that he was denied a fair and impartial trial in violation of the Fourteenth Amendment to the United States Constitution (Petition II, pp. 48-63)

and that he had inadequate defense representation and presentation (Petition III, pp. 53-59).

One sufficient answer to these contentions lies in the fact that at no time did petitioner claim either in the trial court or on appeal that he was deprived of his Federal Constitutional rights. (See cases cited under Point One, Part A.) In fact, the Supreme Court rested its decision wholly and completely upon State, non-federal grounds.

Thus, as to the admission into evidence of the colored photographs, objected to by petitioner at the trial solely upon the ground that they had not been properly authenticated (318a-16 to 20; 319a-27 to 37), the Supreme Court of New Jersey on appeal (27 N. J. 433 (1958)) pointed out that the record conclusively established a proper foundation justifying their admission into evidence and that enlargements as well as colored photographs are admissible in the discretion of the trial court. The court held, consistently with its prior decisions on this issue (*State* v. *Wise*, 19 N. J. 59 (1955); *State* v. *Huff*, 14 N. J. 240 (1954); *State* v. *Meyers*, 7 N. J. 465 (1951); *State* v. *Heathcoat*, 119 N. J. L. 33 (E. & A. 1933)) that the logical relevance of the exhibits was not overwhelmed by their inherently prejudicial qualities so as to impair defendant's right to a fair and impartial trial. 27 N. J. 433, 448-449 (1958).

That this determination was on non-federal grounds cannot be questioned. That no federal claim was made or presented to the New Jersey Supreme Court is also without question.

Similarly, as to the judge's charge, we point out that at no time did counsel for petitioner object to the use of the words now urged as a "vicious and brutual summary of prejudice and hostility imaginable" (Petition, p. 48). See exceptions to charge (969a to 975a). In fact, the very words used by the Court as is clearly demonstrated by a

reading of the record and the opinion of the Supreme Court of New Jersey, were used by the witnesses in describing what they saw and found. In such a brutal murder where the autopsical examination revealed (27 N. J. 433 (1958) at p. 438):

> "* * * the cause of death as 'the total crushing of the skull with a decerebration, traumatic.' Victoria's brain and left eye were completely destroyed. Her teeth were hanging loosely in her mouth and her nose and jaw had sustained multiple fractures. Both her hands were covered with blood, and her fingernails were ripped. * * *."

could any charge using the facts of the case avoid the use of the complained of words? Obviously not. In any event, this portion of the charge was never presented to the New Jersey Supreme Court either as a federal or non-federal question. 27 N. J. 433 (1958).

What has been said as to the words used by the Court is equally applicable to the claim of petitioner that the jury retired with "prejudicial and inflammatory words of the prosecutor and the judge concerning a 'sex murder' ringing in their ears" (Petition, pp. 49-51).

In fact, as disclosed by the record, the only exception to the charge in this respect was taken by the State (975a-36 to 976a-32). How petitioner can blatantly declare "The said Trial Judge, in his charge strongly supported the theory of the People's case as a '*sex-killing*'" (Petition, p. 49) in the face of the Court's declaration that the case was sent to the jury "solely on an act the consequences of which may be bloodshed" (976a-30) as quoted by petitioner (Petition, pp. 50-51), is beyond comprehension. The only conclusion to be drawn from petitioner's claim is that he is suffering from a falsification of the retrospect.

In any event, a reading of the opinion of the Supreme Court of New Jersey demonstrates conclusively that this non-federal claim was never presented or passed upon by it.

As to the failure to submit manslaughter to the jury as contended by petitioner (Petition, p. 51), we point out that had counsel for petitioner read the indictment (1a) or the charge of the Court (948a to 949a), he could easily have discovered that the crime charged was murder in violation of New Jersey statutes 2A:113-1 and 2A:113-2, and not the common law crime. Aside from the fact that petitioner never requested such a charge (980a to 984a) and never excepted to the charge on this ground, the same was never claimed to be a federal deprivation, nor was it ever presented or passed upon by the Supreme Court of New Jersey. 27 N. J. 433 (1958).

Petitioner also urges that the death certificate, "although in the prosecutor's possession" "fixing the 'time of death' at about '10 to 11 P.M.' was never introduced" (Petition, p. 52). One simple answer lies in the fact that its maker, Dr. Gilady, was present and testified at the trial (509a to 516a). How, therefore, could the State, within the rules of evidence, have introduced the death certificate. But more than this, the claim now presented as well as the claims of prejudice arising out of the prosecutor's summation, the introduction of the two blood-smeared rocks, and the claimed withholding of Hommel's clothing were never objected to, claimed as a Federal Constitutional deprivation, or presented and passed upon by the Supreme Court of New Jersey. 27 N. J. 433 (1958).

To conclude, we point out that in any event, every claim of error presented to the New Jersey Supreme Court was of a non-federal nature and was decided on State law.

That the present claims (even though we pass for the moment the insurmountable hurdle that they were never presented to or passed upon by the New Jersey Supreme Court) present no federal question, has long been set at rest.

The States are free to enforce their criminal laws under such statutory provisions and common law doctrines as they deem appropriate. The Fourteenth Amendment does not permit a party to bring to test in the United States Supreme Court every ruling made in the course of a trial in the State Court, nor does it enable this Court to review errors of State law however material under the law. *Buchalter* v. *New York*, 319 U. S. 427, 429, 431 (1942).

See also *Los Angeles Farming, etc. Co.* v. *Los Angeles*, 217 U. S. 217 (1910); *West* v. *Louisiana*, 194 U. S. 258 (1904); *Frank* v. *Mangum*, 237 U. S. 309, 326 (1915); *Young* v. *Territory of Hawaii*, 160 F. 2d 289 (C. C. A. 9, 1947), cert. den. 331 U. S. 849 (1947); *Lisenba* v. *California*, 314 U. S. 219, 228, 236 (1941); *Stein* v. *New York*, 346 U. S. 156 (1953); *Edwards* v. *New York*, 1 L. ed. 17, 76 S. Ct. 1058 (1956).

In the last cited case (*Edwards* v. *New York*) *supra*, the defendant applied for a stay of execution of death warrant, urging deprivation of due process by reason of (1) trial judge's remarks as to jury verdict being subject to review if convicted; (2) newspaper publicity relating to jury's inspection of murder scene; (3) alleged bias of trial judge; (4) alleged perjury of the Prosecutor's principal witness; (5) alleged inadequate corroboration of accomplice testimony under State law; and (6) alleged erroneous instructions by trial court.

In denying the stay, it was concluded that the questions raised no substantive federal question or even sufficiently debatable to lead to the belief that at least four members

of the court would vote to grant certiorari. It was also pointed out that these contentions only involved matters of State law and raised no federal questions.

We submit that in truth and in fact, the claims here made purporting to raise questions under the Constitution of the United States are frivolous.

Petitioner also makes the claim that his trial attorney inadequately represented him at the trial to his prejudice (Petition, Point III, pp. 53-59). He grounds his contention in various claims of serious errors and failures of defense (Petition, p. 53).

We submit that one complete answer to these charges is that at no time did petitioner claim that he was inadequately represented. The trial attorney, Mr. Selser, was the attorney of his choice and was eminently qualified by his years of practice and experience in criminal law both as a practitioner and former Assistant Prosecutor.

It is also significant that after the trial in which these alleged errors were committed, the same Mr. Selser was retained to take the appeal to the Supreme Court of New Jersey, 27 N. J. 433 (1958), assisted in the motion for a new trial (MA12a), and presented the appeal thereon, 29 N. J. 561 (1959).

Nor was this question ever presented, claimed as a deprivation of a federal right, or passed upon by the New Jersey Supreme Court.

In *Michel* v. *Louisiana*, 350 U. S. 91 (1953) even where petitioner had raised the question unsuccessfully in the State court and claimed, among other things, that he was denied effective representation by his appointed counsel, the Court refused to infer lack of effective counsel from the mere circumstance that a timely motion to quash was not filed in time. How more so here where after utilizing

the services of Mr. Selser through trial and two successive appeals we hear, for the first time, the claim of lack of effective counsel.

## POINT TWO

**Petitioner's confession was not extorted nor obtained by means fundamentally unfair, but was given voluntarily. Its admission into evidence was in accordance with the established law of this State, and in so holding the New Jersey Supreme Court decided no federal constitutional question of substance in a manner contrary to the decisions of this Court.**

We have pointed out in our Point One that the question whether defendant was denied due process of law under the Fourteenth Amendment by the admission into evidence of his confession was never raised at the trial or on appeal and was not passed upon by the Supreme Court of New Jersey.

That barrier alone standing in the way of petitioner's claims now raised for the first time should suffice to result in a denial of the writ of certiorari. However, since petitioner has sought to impose upon this Court by stating as facts those things which a simple reading of the record would disclose to be false, and to thus present to this Court a picture of Constitutional deprivation, we are forced to expose these falsehoods to the Court.

Significantly, the statement of petitioner contained in his Reasons for Granting Petition for Writ of Certiorari proclaims, "assuming the questions to be the said facts" (Petition, p. 12).

The difficulty with this assumption is that the record cannot offer any basis for such an assumption.

The uncontradicted facts as established by the record herein show the following:

Acting on information supplied by Joseph Gilroy, a friend of Smith who had loaned his car to petitioner and had become suspicious of stains found in his car (383a-10 to 35; 418a-23 to 32), Detective Graber, accompanied by Investigator Garabedian and Gilroy (496a-4), picked petitioner up at his mother-in-law's home in Ridgewood (419a-34) on March 5, 1957 at 11:30 p.m.

Smith, who had retired at about 10:00 p.m. that evening (669a), arose and accompanied the officers to Mahwah police headquarters (420a).

On arrival at the Mahwah police station, there were present Mr. Galda, Assistant Prosecutor, Chief Smith of Mahwah, Captain DeMarco, and numerous newspaper reporters (420a).

Galda questioned Smith generally at around midnight (475a, 496a-30.) During the conversation with Smith, Detective DeMarco noticed that Smith's hand was lacerated (476a). Smith told Galda that he had fallen out of the car when he had become ill (477a). Examination of Smith's knees disclosed contusions and lacerations (476a) and further questioning disclosed that Smith had thrown away his pants (477a) and a pair of shoes (477a-15). As a result of these disclosures Galda, Detectives Graber and DeMarco, and Lieutenant Haight went with petitioner Smith to Ramsey where Smith pointed out where he had thrown away his shoes in a garbage can (420a-25; 477a-20 to 30). The police continued from there to Chapel Road in an effort to corroborate Smith's story and searched an area of the gravel pit for evidence that Smith had thrown up as related to them by Smith (423a; 478a). The police had a large light (423a) and a car was parked with its lights on the area (478a); yet, the search disclosed noth-

ing (423a; 478a). From the gravel pit the officers and Smith went to his trailer to obtain clothes which petitioner stated he had worn (423a-30). While looking for the jacket Smith informed them that it was at his mother-in-law's house in Ridgewood (423a-37). They continued to Pulis Avenue where Smith said he had thrown away his pants after he had been sick (424a-23 to 37; 480a-10 to 21) and searched at about 3:00 a.m. (434a-14) without success. On the way back to Mahwah they searched Wyckoff Avenue where Smith said he had first been sick, without success (425a-13 to 20).

Subsequently, they all returned to Mahwah police headquarters and soon thereafter at about 3:30 a.m. Graber and Garabedian went back to Ridgewood and picked up the blue jacket previously referred to (425a-25; 496a-36).

At police headquarters a discussion was had as to the possibility of looking for the pants again (480a). While this discussion was taking place Smith was seated in the back of the Magistrate's Court with Gilroy and others who were being questioned (481a-30; 482a-16).

DeMarco told Smith that Smith was going with the officers to search for the place where he allegedly had vomited at the church on Wyckoff Avenue (481a). Before Smith left with Captain Wickham, Sinatra, O'Har, and Garabedian (280a-30; 497a-15) to search this area again, one of the officers went out and brought back some coffee and buns for everyone, including the police, petitioner Smith, and some of the other fellows also being questioned (482a-12 to 17).

The officers left again between 3:00 a.m. and 3:45 a.m. with Smith to find the place where Smith had vomited (497a-15). The petitioner assisted in the search, got out of the car and pointed out where he allegedly had thrown up (280a to 281a; 497a-20 to 28), again without success. Smith

then directed the officers to Pulis Avenue where again a diligent search was made for the pants allegedly thrown away because they had been vomited on (281a-14 to 20; 497a-40 to 498a-10) still without success.

From there the police returned to police headquarters, arriving there quite late (498a-34).

Thereafter, at about 5:00 a.m. arrangements were made to have Smith examined with respect to his injuries to his knees (482a-18). Dr. Gilady was contacted and the examination set for 7:30-8:00 a.m. (482a-24). Sinatra and DeMarco went with Smith in one car while the balance of the officers left for the Prosecutor's Office or their respective police headquarters (482a-20 to 30).

On the way down from Ramsey DeMarco, Sinatra and petitioner Smith stopped at DeMarco's home (482a-32; 541a-31). DeMarco gave Sinatra money to have breakfast with Smith and to return when they were finished so that they could go to Dr. Gilady's office (482a-35). Sinatra went with Smith to have breakfast (482a-38; 542a-9), returned and picked up DeMarco and drove to Dr. Gilady's office (482a-40) where petitioner was examined (483a-5) at about 7:55 a.m. (510a-12).

After the examination by Dr. Gilady, they returned to the Prosecutor's Office (483a-38) where a photographer was called to take pictures of Smith's knees (484a-6). After the pictures were taken Detectives Spahr and DeLisle spoke with Smith at about 10:00 a.m. (485a-7; 519a-9; 522a) with respect to his activities on the night in question (519a-23). During the questioning Smith broke out crying. He asked for a drink of water and a cigarette, both of which were given to him (519a-20 to 27). Smith requested permission to speak to a certain priest that he knew at Don Bosco High School (519a-28; 751a-21). The priest was called (485a-14).

Prior to the arrival of the priest and after regaining his composure, Smith related of his meeting with the deceased, Vickie, and of some of the occurrences at the pit (519a-30 to 520a-4). When the priest arrived about 45 minutes to an hour later (520a-6 to 10) Smith was closeted with him for a considerable length of time, approximately a half hour (751a-25 to 35) after which he gave the Prosecutor the confession (485a-19; 527a-32; 751a-40) in evidence (551a-14; Exh. S-84, 1072a).

The statement was given stenographically at the Prosecutor's Office (531a-23) under oath (527a-29 to 35) in the presence of a disinterested spectator (a member of the then current trial jury panel, not one who sat at the trial of Smith some two months later as urged by petitioner) (Compare 484a-30 with explanation 493a-28 to 494a-20; See also: 516a-23; 517a-30; 528a-30; 531a-17; 543a-27); continued to the vicinity of the crime (531a-26 to 30), and then Smith was taken to Mahwah for arraignment (489a-26).

That the confession was voluntary, uncoerced, given without any threats, promises or violence is not only beyond question, but conceded.

Thus, DeMarco testified that Smith discussed the matters willingly without force, threats, or compulsion (489a-33); Chief Voss of Ramsey related that before giving the statement Smith was asked whether or not he wanted to give a voluntary statement under oath and that Smith said he would, and did (516a-27 to 33). Voss uncontradictedly supported DeMarco that no promises, threats, or violence was used and that Smith was in good shape and answered the questions without hesitation (516a-37 to 517a-10). Chief Smith confirmed that the statement was taken without threats, promises, duress, or coercion of any kind and that the same was voluntary (517a-34 to 518a-14) as did Detective Spahr (527a-30 to 529a-10), the Court Reporter Arthur

J. Ehrenbeck (532a-5 to 18), and the disinterested juror (543a-30 to 544a-35).

In fact, defendant's counsel admitted that the confession was voluntary (532a-30 to 35; 535a-26) although the Court permitted him thereafter to present the testimony of petitioner as to the circumstances under which the statement was given (537a-27 to 538a-40).

Even the petitioner herein did not seriously contend that the statement was wrung from him by threats, promises, coercion, or under circumstances indicating that the same was not his own voluntary act and deed.

He admitted that after being picked up at about 11:30 at night (539a-32) Mr. Galda discussed the matter with him (540-20). While he stated that in "excess of a dozen talked to him about the case" (540a-13) he admitted that only Galda questioned him and "on and off, not continually" (540a-34). Smith's only complaint, if we may call it such, was that on occasions he was cold and that when he "mentioned it to Mr. Galda" he was given Mr. Galda's overcoat (541a-4 to 12). He likewise admitted that Detective Sinatra permitted him to sit in the front seat of the car and turned on the heater (541a-33).

From the above, the conclusion is inescapable that from the time that petitioner was picked up until the time he gave his statement, very little time was spent interrogating him. Most of the time was spent searching for the shoes, pants, and the place where petitioner allegedly vomited; waiting with others who were interrogated, eating, visiting Dr. Gilady, and having pictures taken of his knees. Even petitioner admits that they spent at least two or three hours looking for the pants and shoes (541a-21).

That the procedure outlined above was for the purpose of solving the crime and even to absolve the suspect is clear.

Smith was not accused by Graber (433a-25), wasn't questioned by DeMarco (476a), wasn't accused by Galda (490a-20; 540a-23), and was never handcuffed (774a-19 to 31).

In fact, at the trial, the following took place (774a-33):

"Q. And you weren't mistreated at all during the day were you? A. No, sir.

Q. And as a matter of fact, after you got done—after you were arraigned you were taken by me over to the State Restaurant. Isn't that right? A. That's correct.

Q. And you had a pretty good meal, did you not? A. I think so.

Q. What did you eat? A. I had fried lobster tails.

Q. You had fried lobster tails and you smoked one of my cigars. Is that right? A. Yes."

Finally, we point to the statement itself (Exh. S-84, 1072a). A reading of the same makes clear that here was no massive interrogation by relays of police of a 15 year old held incommunicado without requested counsel as in the *Haley* case (332 U. S. 596 (1948)); no coercion, ill-treatment or positive proof of the involuntary nature of the confession from the District Attorney's summation found in *Malinski v. New York*, 324 U. S. 401 (1945); no thirty-six consecutive hours without sleep or rest while being held incommunicado as in *Ashcraft v. Tennessee*, 322 U. S. 143 (1944); no several day six to eight relays of questioning and confinement in the "hole" as in *Watts v. Indiana*, 338 U. S. 49 (1948) or the denial of requested counsel of an indicted defendant who faced persistent questioning despite his repeated refusal to talk, from whom a confession was extracted by physical and psychological pressure when he yielded to a false friend's entreaties as shown in *Spano v. New York*, —— U. S. ——, 3 L. ed. 2d 1265 (1959).

We point too, to the fact that at no time was defendant denied counsel, nor was he even arrested or formally charged with a crime at the time of the confession.

It should also be noted that in the *Spano* case, *supra*, the concurring opinion of Justices STEWART, DOUGLAS, and BRENNAN emphasizes, at page 1274:

> "Let it be emphasized at the outset that this is not a case where the police were questioning a suspect in the course of investigating an unsolved crime. See *Crooker v. California*, 357 U. S. 433, * * *; *Cicenia v. Lagay*, 357 U. S. 504, * * *."

Thus, in the confession itself, we find strong indicia that the same was given voluntarily during a temperate and courteous interview in which petitioner was allowed to interrupt as he saw fit, answer or not, and to talk without interruption.

Petitioner was introduced to those present (including a disinterested juror) (Exh. S-84, 1073a-11). He was asked if he would give a voluntary statement under oath (1073a-15 to 20); whether he cared for "coffee or anything" (1073a-28), and note this question and answer from the alleged coerced petitioner (1075a-36):

> "A. Yes. Can I ask a question here?"
>
> Q. Surely. A. Like I explained to you before I am a little fuzzy on this. As I go along, can I add on—
>
> Q. Certainly, just as you know the incident as it actually occurred—and you can interrupt at any time you want. A. That is what I want to do—interrupt."

Notice too, that rather than examination and cross-examination, petitioner related what occurred mostly in narrative form (1074a-23; 1075a-12; 1076a-16; 1077a-23 to 1078a-23; 1079a-29; 1080a; 1081a; 1082a; 1083a; 1084a;

1085a; 1086a); when he didn't remember, no pressure was exerted (1079a-12; 1088a-8; 1089a-8; 1092a-25; 1097a-13); nor when he said he didn't know (1087a-23; 1090a-30 to 40; 1091a-4 to 10); and when he asked to go to the men's room a recess was taken (1086a-40 to 1087a-10). Coffee was offered to him again (1097a-18) and again (1099a-29) and when requested, milk was sent out for and a recess taken (1099a-36 to 1100a-4).

Finally, we point to the following (1100a-13):

> "Q. What we are going to do now, on the places you indicated to us, we are going to go to the area. It will be with the same people in this room and we are going in two cars and you can point out these things you mentioned on the spot. *Is that agreeable to you?* A. *Yes.*
>
> Q. *And while you were in custody of the policemen and up at the Mahwah Police Headquarters, did anybody mistreat you or anything?* A. *No, sir.*
>
> Q. *Everybody treat you all right?* A. *Better than I expected.*
>
> Q. *I beg your pardon?* A. *Better than expected.*
>
> Q. *Very well. It's nice to hear.*" (Italics supplied)

Even when going over the scene of the crime and while going to the petitioner's trailer when the petitioner manifested concern about disrupting the baby and a desire not to go into the area, the Prosecutor acquiesced (1108a-22 to 40).

Was this the action of an inquisitor setting the stage for the "lamb" to be slaughtered? Was this the action of a cunning, cajoling, falsely sympathetic, gloating, skilled prosecutor bringing the petitioner to the brink of doom as word-pictured by counsel for petitioner? We submit that no group of law enforcement officials could have treated a suspect with more temperance, courtesy, or solicitude.

That the petitioner knew that he was giving the statement with reference to the killing of Vickie Zielinski is clear not only from the statement but from the fact that petitioner heard it on the radio, discussed it with Hommell and Gilroy, with his wife, and read it in the newspaper (665a-6 to 666a-10; 721a-30 to 725a-40). The statement by counsel for petitioner that Smith didn't even know of the killing when questioned is obviously without merit or support in the record.

The statement that petitioner was "'obliged' to change from his street clothes to *prison-denims*" (italics by petitioner) (Petition, p. 24) is a bald lie (523a-20) as is his statement (Petition, p. 15) that petitioner was held "from 11:00 the night of March 5th" "to about 1:00 p.m. of March 6th, with the extended inquisition and interrogation that led to the 'confession'" and "seven (7) hours more" "a total of twenty (20) hours" "unlawfully held" (See *supra* detailed procedure).

That defendant was not subjected to massive interrogation "in fact, twenty (20)" (Petition, p. 25) is clearly not only not supported by the record, but is obvious from the inclusion of Dr. Gilady, Stenographer Ehrenbeck, and every person who had anything to do with the case.

That petitioner did see a priest prior to giving his statement (751a) and not "supposedly" as stated by counsel for petitioner (Petition, p. 36) is also without question, as is the fact that petitioner told the same story as in his statement to three doctors on a separate occasion while in jail (783a-23), not at the time as when he saw the priest as stated by counsel for petitioner (Petition, p. 36).

While the Petition is replete with crass lies, half-truths, and outright falsehoods completely unsupported by any record references, we have pointed out the above merely as an example so that this Court should not be misled by

other unsupported statements made by the petitioner to which we have not referred.

We must, however, point to the false inference attempted to be created by petitioner when he refers to the disinterested juror, Kalstad, as being on the same panel as that from which the trial jury in this case was drawn, thus infecting another juror who sat at the trial some two months later (Petition, pp. 41, 42). Not only is this inference false since juror Kalstad sat in March, 1957 (107a, when the statement was taken, and juror Hundemann sat at the trial in May, 1957 (M.A101a), but the appeal taken from the denial of the new trial raised no issue that one of the jurors had been prejudiced and manifested prejudgement (29 N. J. 561 (1959)) by contact with Kalstad.

We submit that a careful reading of the record will clearly indicate that there are no conceded facts existent here which are irreconcilable with mental freedom. *Lisenba* v. *California*, 314 U. S. 219 (1941); *Lyons* v. *Oklahoma*, 322 U. S. 596 (1943) requiring this Court to intervene. On the contrary, we suggest that the uncontradicted, conceded facts clearly indicate that the petitioner was not denied due process of law in violation of the Fourteenth Amendment to the Federal Constitution in the admission into evidence of his voluntary statement. The holding of the Supreme Court of New Jersey comports with the decisions of this State both as to the admission into evidence of a voluntary statement, *Roesel* v. *State*, 62 N. J. L. 216 (E. & A. 1898); *State* v. *Jefferson*, 131 N. J. L. 70 (E. & A. 1943), and as to assistance of counsel, *State* v. *Grillo*, 11 N. J. 173 (1952), cert. den. *sub nomine*, *Grillo* v. *State of New Jersey*, 345 U. S. 976 (1953); *State* v. *Bunk*, 4 N. J. 46 (1952), cert. den. 340 U. S. 839 (1952); *State* v. *Cole*, 1 N. J. L. 606 (E. & A. 1949), cert. den. 334 U. S. 851 (1949); *State* v. *Murphy*, 87 N. J. L. 515 (E. & A. 1915). Nor is it

decision contrary to the decisions of this Court, *Crooker* v. *California*, 357 U. S. 433 (1958); *Cicenia* v. *Lagay*, 357 U. S. 504 (1958); *Ashdown* v. *Utah*, 357 U. S. 426 (1958); *Thomas* v. *Arizona*, 356 U. S. 390 (1958); *Anonymous* v. *Baker*, —— U. S. ——, 3 L. ed. 2d 1234, 1238 (1959).

What was said in *Stein* v. *New York*, 346 U. S. 156 (1953), at page 184 is peculiarly appropriate:

> "* * * Interrogation is not inherently coercive, as is physical violence. Interrogation does have social value in solving crime, as physical force does not. By their own answers many suspects clear themselves, and the information they give frequently points out another who is guilty. Indeed, interrogation of those who know something about the facts is the chief means of solution of crime. The duty to disclose knowledge of crime rests upon all citizens. It is so vital that one known to be innocent may be detained, in the absence of bail as a material witness. This Court never has held that the Fourteenth Amendment prohibits a state from such detention and interrogation of a suspect as under the circumstances appear reasonable and not coercive.
>
> Of course, such inquiries have limits. But the limits are not defined merely by calling an interrogation an 'inquisition', which adds to the problem only the emotions inherited from medieval experience. The limits in any case depend upon a weighing of the circumstances of pressure against the power of resistance of the person confessing. * * *."

As to the number of officers involved in the questioning, the Court said, at page 185:

> "* * * It is also true that the questioning was by a number of officers at a time and by different officers at different times. But we cannot say that the use of

> successive officers to question these petitioners for the periods of time indicated is so oppressive as to overwhelm powers of resistance. While we have reversed conviction founded on confessions secured through interrogations by 'relays', we have also sustained conviction when, under different circumstances, the relay technique was employed. But we have never gone so far as to hold that the Fourteenth Amendment requires a one-to-one ratio between interrogators and prisoners, or that extensive questioning of a prisoner automatically makes the evidence he gives in response constitutionally prohibited."

As to delay in arraignment, the Court reiterated its long-standing pronouncement at page 187:

> "Petitioners confuse the more rigorous rule of exclusion which, in the exercise of our supervisory power, we have promulgated for federal courts with the more limited requirements of the Fourteenth Amendment. This, we have held, did not impose rules of evidence on state courts which bind them to exclude a confession because, without coercion, it was obtained while a prisoner was uncounseled and illegally detained. * * *."

See also: *Stroble* v. *California*, 343 U. S. 181, 197 (1952); *Brown* v. *Allen*, 344 U. S. 443, 476 (1953); *Gallegos* v. *Nebraska*, 342 U. S. 55, 63 (1951).

Nor is petitioner's reference to Rule 3:2-3 of the Rules of the Superior and County Courts, as a statutory provision of the Revised Statutes (Petition, pp. 7, 38) correct. In fact, the same is not a statutory mandate, but rather a rule of court, a violation of which has already been determined by the decisions of the State of New Jersey as not violative of due process even where the same was claimed. *State* v. *Bunk*, 4 N. J. 461 (1950), cert. den. 340 U. S. [illegible] (1950).

Petitioner now also urges for the first time that "the prosecutor's emissary stealthily" "'stole' into the prison, to prevail upon petitioner to sign the so-called 'confession' but upon his refusal tricked and cajoled him into 'acknowledging' its accuracy, which abortively served its purpose" (Petition, p. 44). Aside from the fact that petitioner never contended at the trial or on the appeal from the conviction that his confession was acknowledged by him in a manner violative of the Federal Constitution, the fact is that the decision on this aspect in the Supreme Court of New Jersey was based solely on State rule of evidence and non-federal basis. Thus, the Supreme Court of New Jersey held, 27 N. J. 433 (1958) at page 459:

> "A confession made by a defendant need not be signed by him to make the document itself admissible. If it was read over to the accused, or by him, if it was signed or otherwise admitted by him to be correct, it is admissible. *State* v. *Monahan*, 16 N. J. 83 (1954); *State* v. *Cleveland*, *supra*; *State* v. *Foulds*, 127 N. J. L. 236 (E. & A. 1941); *State* v. *Donato*, 106 N. J. L. 387 (E. & A. 1930); *State* v. *Lustberg*, 11 N. J. *Misc.* 51 (Sup. Ct. 1933); Admissibility in evidence of unsigned confession, 23 A.L.R. 2d 919."

It follows, of course, that there is no State statute here involved that requires interpretation under the United States Constitution not heretofore decided by the highest Court of New Jersey as presented by petitioner as a reason for granting the writ (Petition, p. 12).

To conclude this Point, we vigorously deny that the confession was the sole evidence of the State's case, as baldly stated by petitioner (Petition, pp. 2, 12, 13). In fact, as declared by the Supreme Court of New Jersey in both appeals (27 N. J. 433, 462 (1958)):

> "* * * We are convinced, however, that the accumulation of evidence was more than sufficient to justify a finding of guilt beyond a reasonable doubt. Clearly, defendant's conviction was warranted."

And in 29 N. J. 561 (1959) at page 575 (Motion for new trial appeal) the Court said:

> "* * * We have re-examined the original record, as well as the earlier opinion, and find no basis whatever for withdrawing from or qualifying our determination that the evidence was devastatingly convincing of the defendant's guilt. * * *."

We submit that if we eliminate the unfounded assertions made by petitioner, the half-truths and bald lies which find no support in the record, we are left only with the uncontradicted fact that petitioner who conceded that he was not mistreated, after a closed door conference with his requested spiritual advisor, gave a voluntary statement, thrice repeated to doctors, confessing the circumstances under which he committed the crime.

That this case and the decision of the Supreme Court of New Jersey present no federal question or basis for review, nor does it represent a departure from the decisions of this Court, clearly and convincingly appears.

## POINT THREE

**The Court's ruling denying the request that defendant be present at the hearing of the motion for a new trial presents no federal question of substance, nor is it contrary to the decisions of this Court.**

The Supreme Court of New Jersey, in reviewing petitioner's contention that error was committed in the trial Court's denial of a request to have petitioner attend the hearing on the motion for a new trial, pointed out that (29 N. J. 561 (1959) p. 577):

"* * * There was no statement on the motion that Smith was to be a witness; on the contrary, the moving papers contained material which was beyond Smith's personal knowledge. Nor was any representation made to the court thereafter during the hearing or at the conclusion of the testimony or even after the adverse determination that defendant had pertinent information to present in rebuttal. At the oral argument before us counsel stated that Smith could have questioned the assertion of one witness, who had been in attendance at Pelzer's Tavern on the evening of March 4, that he did not know D. H. Accepting the representation, such rebuttal, if introduced, could not have affected the result. Complete elimination of the witness' testimony would be without material significance in the case."

The Court concluded, *supra*, page 578:

"* * * The weight of authority in other jurisdictions is that the constitutional right to be present applies to the trial, the proceeding for the determination of the guilt or innocence of the accused. It does not require his appearance at a post-conviction hearing on a motion for a new trial. * * * (citing cases). Our rules of criminal practice reflect the general rule. R.R. 3:5-4(a) calls for the presence of the defendant 'at every stage of the *trial* including the impaneling of the jury and the return of the verdict, and at the imposition of sentence * * *'* * *." (Emphasis by Court).

Aside from the fact that petitioner at the trial never contended that he had any constitutional right, State or federal, to be present at the motion for a new trial hearing (MA17a-26 to MA18a-26), can it be said that under the circumstances here disclosed there was a denial of petitioner's constitutional rights contrary to the decisions of this Court?

We submit that this cannot be. The defendant was represented by counsel at the hearing on the motion for a new trial unlike *Chessman* v. *Teets*, 354 U. S. 156, (1957) cited petitioner (Petition, p. 62) and *United States* v. *Hayman*, 342 U. S. 205 (1952) held only that under the 1948 revision of the Judicial Code applicable to the federal courts, the petitioner's request to be present at the hearing on his application to vacate a sentence under §2255 should have been granted where the testimony taken pertained to fundamental issues of fact as to events in which he had participated and the testimony was taken without notice to him and not in his presence.

It should be noted, however, that the Court significantly stated, in the last cited case, at page 222:

> "The existence of power to produce the prisoner does not, of course, mean that he should be automatically produced in every §2255 proceeding. This is in accord with procedure in habeas corpus actions. Unlike the criminal trial where the guilt of the defendant is in issue and his presence is required by the Sixth Amendment, a proceeding under §2255 is an independent and collateral inquiry into the validity of the conviction. * * *."

Where, as here, assuming for the moment that the Sixth Amendment is applicable, the petitioner had no pertinent information to present in rebuttal and had not participated in any of the events which were testified to, it cannot be said that he was prejudiced in any way.

While petitioner urges (Petition, p. 62) that the issue raised at the hearing concerned itself primarily with a "false alibi" presented by a "prime suspect" implicated by petitioner by placing him at the scene of the crime, this question had already been authoritatively determined by a jury and sustained on appeal.

The Court stated (27 N. J. 433 (1958)) at page 464:

"Smith testified D. H.'s threat was delivered on Main Street in Ramsey at approximately 9:20 p.m. on the night of March 4. D. H. stated he did not see Smith at all on the night of March 4 and that at 9:20 p.m. he was in a tavern a number of miles away. A friend of both D. H. and Smith confirmed D. H.'s presence in the tavern at the time in question. Furthermore, according to Smith's story at trial, D. H. must have appeared at the sand pit between 8:30 and 9:00 p.m. Yet the pharmacist at the drugstore where D. H. worked testified D. H. was sent to pick up merchandise at another drugstore in Ridgewood, a 16 to 20-minute trip according to one of the officers who clocked it, at 8:35 p.m. and returned shortly before 9:00 p.m. with the right package, not leaving the store again until shortly after 9:00 p.m. The combined and impressive testimony of D. H.'s 'alibi' witness is totally incompatible with defendant's position that D. H., not he, killed Victoria.

Additionally, all of the incontrovertible physical facts point to defendant's guilt as do his actions after his admitted struggle with Victoria."

In *Chessman* v. *Teets*, *supra*, the Court took pains to state, at page 164:

"* * * All we hold is that consistently with procedural due process, California's affirmance of petitioner's conviction upon a seriously disputed record, whose accuracy petitioner has had no voice in determing cannot be allowed to stand."

In any event, the law is clear in New Jersey and elsewhere that it is not necessary that the accused be present at the hearing of a motion for a new trial, even though tes-

timony for or against the motion is taken, and notwithstanding the accused is given, by statute or by constitutional provision, the right to be present during his trial, because the hearing on a motion for a new trial is not a part of the trial. *Barber* v. *United States*, 142 F. 2d 84 (4 Cir. 1944), cert. den. 322 U. S. 741 (1944); *Jones* v. *State*, 236 Ind. 529, 141 N. E. 2d 109 (1957), cert. granted but limited to a different question, 355 U. S. 812 (1957); 23 *C.J.S. Criminal Law* § 974, 1504, pp. 307, 1325; *State* v. *Beatley*, 46 N. J. Super. 193, 204 (App. Div. 1957); *Nee* v. *State*, 6 N. E. 2d 570, 572, 211 Ind. 228 (Sup. Ct. 1937); *Council* v. *Clemmer*, 177 F. 2d 22, 24 (C. A. D. C. 1949), cert. den. 338 U. S. 880 (1949).

While petitioner makes much of the testimony of one Herbert Pelzer (Petition, pp. 60, 62), suffice it to say that the trial Court found him to be "a thoroughly unreliable, incredible witness, careless with the truth who has made so many varying, unfounded, untruthful statements" * * * "that no person, no juror could give any statement he might make in that respect any credibility whatsoever" (29 N. J. 561 (1959)), at page 574. The Supreme Court of New Jersey held, with reference to his testimony, at page 574, *supra*:

> * * * * And study of it in relation to the entire record leaves an abiding conviction of its untrustworthiness. Judged by the most liberal standard, it would not justify this court in declaring that the trial court abused his discretion in rejecting it as a basis for vacating the verdict of the jury."

Even Selser, attorney for petitioner, stated on inquiry by the Supreme Court of New Jersey, that he didn't call Pelzer at the trial because he "did not believe him" and that moreover, he was "under the influence of intoxicating liquor" at the time. 29 N. J. 561, 570 (1959).

The final thrust of petitioner relates to a claim that "at least one juror had unlawfully expressed and communicated his prejudged and prejudicial opinion while the trial was in progress." (Petition, p. 60).

Aside from the fact that this charge was completely refuted at the hearing on the motion for a new trial, the record discloses that on the appeal of the denial of a new trial, petitioner abandoned completely any such charge and the question was never presented to the New Jersey Supreme Court as a State or federal question.

We submit that it clearly appears that the Court's ruling below denying the request that petitioner be present at the new trial-hearing presents no federal question of substance meriting consideration by this Court, nor is the decision of the Supreme Court of New Jersey contrary to the decisions of this Court.

## CONCLUSION

The attempt by the petitioner to bring the case at bar within the scope of the review power of this Court as shown, *supra*, is actually frivolous and without merit. The questions presented here were never raised in the trial court, presented to the highest Court of New Jersey, or passed upon by said Court. The decision of the New Jersey Supreme Court was based solely and exclusively upon State decisional law and represents no departure from the State law, nor is it contrary to the decisions of this Court.

**We submit that no substantial federal question meriting review by this Court is properly raised in the instant case, and for this and the reasons hereinbefore set forth, it is respectfully submitted that the petition for a writ of certiorari should be denied.**

Respectfully submitted,

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*The State of New Jersey.*

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1959

**Appellate No. 264**

EDGAR SMITH,

*Petitioner,*

*vs.*

STATE OF NEW JERSEY,

*Respondent.*

## REPLY BRIEF TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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## *REPLY*

## POINT I

**The opposition of the respondent is based upon a false premise that proper objection was not made by the petitioner in the court below as to the admission into evidence of the "confession" which denied due process under the 14th Amendment to the petitioner; it unequivocally appears in the record, more particularly when the Supreme Court of the State of New Jersey ruled "—we will treat the confession as though its introduction had been opposed upon every conceivable legal ground".**

### A. The Supreme Court of New Jersey did pass upon the question of "voluntariness" of the "confession"—considering objection upon "every conceivable legal ground".

In the said Opinion of the State Supreme Court of New Jersey (27 N. J. 433 (1958)) regarding grounds relied upon in objecting to the introduction into evidence of the said controversial confession (Exhibit S-84) the said Appellate Court apparently cast aside any technicalities by ruling upon the "voluntariness" objection by trial counsel and holding:

> "Although we have difficulty concerning the error upon which the defendant actually relies, we will treat the confession as though its introduction had been opposed upon *every conceivable legal ground.*" [Opinion (Appx. New Jersey Supreme Court; p. 25] (italics supplied)

This point was included (although not emphasized) in petitioner's original brief (p. 33), but apparently "escaped the attention" of the respondent. We there said:

"Even though the legal grounds of objection to the confession was in doubt on the trial and upon appeal, which doubt was attributable to inadequacy of counsel, the State Supreme Court held:

> "The confession was treated on appeal as though its introduction had been opposed on every conceivable ground."

Of course, we need not point up that "every conceivable legal ground" concededly would include the "involuntary" objection that was raised at the trial and every State or Federal objection constituting a denial of due process of law. Thus, if the highest Court in the State of New Jersey saw fit to pass upon "every conceivable legal ground" concerning the admissibility of this controversial and pivotal "confession" (the sole and primary evidence in the people's case) then we cannot understand the respondent's concern in so vehemently seeking to forestall this Honorable Court's passing upon the same questions.

In reply, we submit (to paraphrase Shakespeare) "me thinks the 'prosecutor', he protesteth too much."

So, despite the respondent's argument to the contrary (Points One and Two) proper objection "upon every conceivable legal ground" was *concededly* raised (*supra*) both at the trial and upon appeal to the New Jersey Supreme Court. This is conclusively shown by the Court's ruling on this vital point (*supra*).

The respondent's evasive and vituperative brief in opposition is reminiscent of the legal classic of admonition: "when the facts are with you—shout the facts; when the law is with you—shout the law; but when neither the facts nor the law are with you—just shout!"

And, so the prosecutor shouts "lies", "half-truths", "falsehoods", "frivolous", etc. at the petitioner and his

present counsel, but utterly fails to point out wherein we falsify, distort or indulge in frivolities. The prosecutor himself distorts, misquotes and half-quotes the record in an abortive attempt to justify this bald and cowardly assertion.

This is indeed a ghastly "accusation" against petitioner's present counsel considering a man's life is in the balance of justice.

Respondent, at pages 16-17 of his brief, supplies italics to emphasize portions of the opinion of the State Supreme Court of New Jersey, to suit its purpose, but is remiss to tell this Honorable Court that the said Court below held further, as noted herein, that: "* * * we will treat the confession as though its introduction had been opposed *upon every conceivable legal ground.*"

If the prosecutor had completed the full quote on this point (and properly and fairly so) by the State Supreme Court of New Jersey, it would have foreclosed his present main argument; it consumes much of his opposing brief from pages 14 through 40 on this vital point.

**B. The trial court did pass upon the question of "voluntariness" of the "confession" after objection, argument and hearing.**

Counsel for petitioner at the trial *did object to the "voluntariness" of the confession* (pp. 537a to 538a; 544a to 551a) and the appeal Court thereafter encompassed "every conceivable legal ground" (*supra*) of objection to the introduction of the controversial "confession"; we must thus look to the substance and not the words to conclude that taken together, the "involuntary" objection by petitioner and the subsequent concession by the Appellate Court preserved the petitioner's rights under the due process clause of the Fifth and Fourteenth Amendments.

The petitioner did object to the admission into evidence of the said confession at his trial *as to its being involuntary.* Trial counsel at first objected to its admission as not to be considered as a "confession" and then when the court concluded it was to be treated as a confession, trial counsel objected to its "voluntariness" specially setting up the opposition to its admission as to the "*state of mind (of petitioner), and the circumstances, all of which led up to the event, all of which would go into the voluntariness of the statement*". (p. 537a).

Although there was some "confusion" as to the objection to the confession (as the Supreme Court of New Jersey observed and then clarified in its Opinion (*supra*), the prosecutor in his brief failed and neglected to include this colloquy with the trial court as to the confession:

> "Mr. Selser: Yes, sir, I think too I should like to call Smith with regard to it and have some testimony taken with regard to it and have some testimony taken with regard to the circumstances preceding the taking up to the time of the taking.
>
> The Court: As to the voluntariness?
>
> Mr. Selser: Yes, as to the voluntariness, as to his state of mind, all of which led up to the event, all of which would go into the voluntariness of the statement.
>
> The Court: All right (p. 537a)
>
> The Court: That is perfectly in order and proper. In other words, what we are doing now is reopening the question of the voluntariness which had previously been stipulated in the course of the trial and entering upon a hearing outside the presence of the jury on the issue of the voluntariness of this document or statement as a confession.
>
> Do you understand?
>
> Mr. Selser: Yes, I understand.

The Court: 'And both sides will have the opportunity to furnish evidence outside the hearing of the jury on that question and I will pass upon it outside the presence of the jury, on that question.'' (pp. 538a to 539a)

Thereafter, a preliminary (although cursory) examination was conducted solely on the question of ''voluntariness'' of said confession (p. 538a). The said objection as to its being involuntary certainly was sufficient basis to perform the objection of a denial of due process under the Fourteenth Amendment.

However, the Court concluded that the confession was ''voluntary'' and so instructed the jury. *Instead of leaving that all-important question of ''voluntariness'' to the trial jury*, the trial judge concluded that it was ''voluntary'' and merely left to the jury the question of (as he put it) ''credibility'' (p. 963a).

The respondent's present argument that ''the question whether defendant was denied due process of law under the 14th Amendment not having been raised at the trial or on the appeal and not having been passed upon by the New Jersey Supreme Court'' is wholly without merit; the prosecutor distorts, misquotes and half-quotes the record in this desperate effort to keep the petitioner out of the jurisdiction of this Honorable Court.

The full text of the record proves otherwise. Objection to the ''voluntariness'' of the confession was timely made and subsequently bolstered by the Appellate Court's ruling (*supra*) that in any event, it would consider that the objection was upon *every conceivable legal ground*. (''Opinion'' New Jersey Supreme Court, *supra*)

Of course, ''every conceivable legal ground'' (as the State Supreme Court of New Jersey so ruled) includes

every legal ground as set forth in the petitioner's brief (Point I) presenting the question whether the confession was properly admitted into evidence under the Fourteenth Amendment.

To say that the Supreme Court in New Jersey only passed upon "State" questions concerning the said "confession" (as the prosecutor would have it) would give the Court's ruling (*supra*) a most narrow, distorted and limited interpretation of its ruling, not justified in fact or law.

Certainly, if the said appellate court made such an assumption or concession and reviewed the case, treating *the confession*, as though its introduction had been opposed upon "every conceivable legal ground", *this Honorable Court should do no less.*

If the Supreme Court of New Jersey, in doubt as to the accuracy or definiteness (as it points out) of the defendant's objection to the controversial confession, convicting petitioner in this capital case and treated the objection as encompassing "every conceivable legal ground" of objection to said confession, certainly the prosecutor should not be heard to complain, when a young ex-Marine's life is at stake at this posture of the case.

We don't think even the prosecutor could reasonably and fairly argue that the Supreme Court of New Jersey could not lawfully make the assumption or concession it did in the interests of Justice.

So, contrary to the respondent's present argument, it also affirmatively appears from the record that "every conceivable legal question", including State and Federal questions, (concerning the "confession") was presented to the highest Court of the State of New Jersey and was properly and specially set up by the Court itself when it ruled as hereinabove noted.

We submit that the Supreme Court of New Jersey, realizing this to be *a capital case*, did not dwell upon the niceties of the objections raised by trial counsel; *did pass upon this murder conviction as if "every conceivable legal objection" was raised to "this confession" which was instrumental in convicting petitioner and sentencing him to death.*

We apologize for belaboring this point but the prosecutor has made much of this "technical objection". We further submit that the Supreme Court of New Jersey considered this confession as if "every conceivable legal objection" that should have been raised was taken concerning any invasion of the petitioner's legal and constitutional rights; *and rightly so in this capital case.*

The holding of the Supreme Court of New Jersey that it would treat the confession as though its introduction had been opposed "on every conceivable legal ground" (the said phrase) must be and should be given the most liberal and fairest interpretation. The most liberal and fairest interpretation possible and favorable to the petitioner would include every legal objection to the admission into evidence of an unlawful confession that would preserve all his legal rights under the due process clause of the United States Constitution.

In the face of the holding by the high court of the State of New Jersey, we submit that this Honorable Court has jurisdiction in this matter *and* as pointed out in the petitioner's brief (Point I).

**C. The prosecutor, despite his protests, "supports" petitioner's contention as to "massive interrogation" in relays of "inquisitors".**

The respondent's brief (Point Two) substantially supports petitioner's contention (although "disputing" it) that the relays of police and prosecutor inquisitors (20 in number) questioned him as set forth in our brief.

The prosecutor's brief, despite his objection to our including the court stenographer (as was enumerated in the *Spano* case; see opinion of this Court) and the examining doctor, refers to fifteen (15) of the officials in at least 3 relays through the night and following day, participating in the continuous relays of "investigation" and "questioning" of this petitioner:

1. Det. Graber (p. 27) (reference to respdt's brief)
2. Invest. Garabedian—(p. 27)
3. Chief Asst. Prosec. Galda—(p. 27)
4. Police Chief Smith, Mahwah—(p. 27)
5. Capt. DeMarco—(p. 27)
6. Lt. Haight—(p. 27)
7. Capt. Wickham—(p. 28)
8. Det. Sinatra—(p. 28)
9. Det. O'Har—(p. 28)
10. Dr. Gilady—(p. 29)
11. Det. Spahr—(p. 29)
12. Det. Lisle—(p. 29)
13. Prosecutor Calissi—(p. 30)
14. Chief Voss, Ramsey—(p. 30)
15. Ehrenbeck, steno—(p. 31)

The prosecutor omits and the record discloses other officials participating as noted, to comprise twenty (20) in all, as contended and listed in petitioner's brief (p. 25).

16. Invest. Nuno—(p. 482) Reference to petitioner's ~~brief~~ trial record.

17. Invest. Perrapato—(p 482)

18. Lieut. Doremus, Ramsey—(p. 280)

19. Det. Ridgeway—(p. 280)

20. Det. Chief Stewart—(p. 481)

**D. The prosecutor presently "minimizes" the presence of a "juror"; a member of the "current jury panel".**

The prosecutor concedes that this "confession" was given in the prosecutor's office in the presence of a "juror", but characterizes him as a "disinterested spectator". Pray tell, why was he there if he had no interest in said criminal proceedings? The prosecutor also glosses over the matter lightly by stating that this juror was only on the "current jury panel" and not on the jury trial. We never urged that he was on the trial jury but on the "jury panel" which, in and of itself, is of serious consequence (Pet.'s brief, pp. P41-42). The same ("disinterested") "juror" was present at much of the other stages of the proceedings including the "investigation" and "questioning" of the petitioner.

That this is most irregular and unlawful needs no further argument to demonstrate. It should be considered a most serious invasion of petitioner's fundamental and constitutional rights and denial to him of a fair and impartial trial (Petitioner's brief pp. 41-42.)

The prosecutor seeks to minimize "massive interrogation" claimed herein by attempting to keep the petitioner out of the prolonged "investigation" and "questioning", although the record discloses petitioner was in it, every step—every minute of the way—by relays of police and

prosecuting officials, which literally dragged petitioner through the night and following day. The prosecutor would presently insult the court's intelligence referring to this inquisition as "general discussions".

Finally, the prosecutor defends himself in his "plea of innocence" brief—"No such thing here", he claims, as in the cases he cites therein, no such "*one thing*"; we agree; we have here an *accumulation of all things* abhored and condemned in said leading cases by this Honorable Court.

Rather than "examination and cross-examination", says the prosecutor, this "confession" was in narrative form. The "confession" (Ex. S-84) contains some 380 odd questions by the prosecutor of this petitioner!

**E. The prosecutor presently describes his quasi-judicial proceeding" and the "unlawful confession" as a "courteous interview".**

Concerning the prosecutor's present nonsensical characterization of the "confession" as a "temperate and courteous *interview*", may the petitioner respectfully recall the words of noted writer, John Mason Brown:

> "The prosecutor's by obligation is a special mind, mongoose quick, bullying, devious, unrelenting, forever baited to ensnare. It is almost duty bound to mislead, and by instinct dotes on confusing, and flourishes on weakness. Its search is for blemishes it can present as scars, its obligation to raise doubt or sour by suspicion. It asks questions not to learn but to convict, and can read guilt into the most innocent of answers.
>
> Its hope, its aim, its triumph is to addle a witness into confession by tricking, exhausting, or irritating him into a verbal indiscretions which sounds like a

damaging admission. The natural lapses of memory it gives the appearance either of strategems for hiding misdeeds or, worse still, of lies, dark and deliberate. Feigned and wheedling politeness, sarcasm that scalds, intimidation, surprise, and besmirchment by innuendo, association, or suggestion, at the same time that any intention to besmirch is denied—all these as methods and devices are such staples in the prosecutor's repertory that his mind turns to them by rote."

**F. The prosecutor obtained the "controversial confession", under oath, contrary to the New Jersey Statute and the United States Constitution.**

By whatever name the prosecutor seeks to refer to Rule 3:2-3 of the Rules of Criminal Procedure of the State of New Jersey, it is a statutory provision similar to Rule 5(a) of the Federal Rules of Criminal Procedure providing for "arraignment" without unnecessary delay, etc. and "hearing" etc., of a person accused of a crime (see *Mallory* case, petit's. brief, p. 38).

It is important to note that even under said statutory provisions of the State of New Jersey, the Magistrate shall inform the defendant of his right to counsel, etc., shall also inform the defendant of his "right to make a statement, *not under oath* as to the charge against him; that he is not required to make such a statement and any statement made by him may be used against him—" (emphasis ours)

Here not alone did the prosecutor usurp the functions of a Magistrate in the conduct of his own quasi-judicial proceeding, but he seriously and further violated the statute by obtaining a statement from petitioner *under oath* (confession Ex. S-84). The prosecutor, also unlawfully, failed to advise petitioner of his legal and constitutional rights, including his right to counsel and the right not to incrim-

inate himself. That this is contrary to the Fifth and Fourteenth Amendments of the United States Constitution is clear, indeed. Petitioner does not only claim the violation of this statute (*supra*) as the prosecutor now defends, but an accumulation of deprivation of petitioner's rights that make for a denial of due process (Point I, petitioner's brief).

**G. The prosecutor utterly fails to answer petitioner's charge that he was unlawfully held as a "Defendant" charged with *"Murder"*, prior to "confession".**

As to the "quasi-judicial proceeding" conducted by the prosecutor in obtaining the confession in question, he presently avoids the issue and fails to answer petitioner's contention more particularly that the face of the transcript itself (Ex. S-84) proves beyond question that the petitioner was a "Defendant" then charged with "Murder" (p. 18, petitioner's brief).

The only defense the prosecutor could now submit to this "unlawful confession" is his reference to this "temperate and courteous *interview*" (p. 33). How about the established fact that the confession was allegedly given *under oath* contrary to the New Jersey Statute (*supra*) and in violation of petitioner's constitutional rights, without arraignment, without advice and without counsel, etc. in this quasi-judicial proceeding? The prosecutor now has the temerity to refer to this outrage as a "courteous *interview*" (see p. 33 of respondent's brief).

The confession, as we contend, is violative of the United States Constitution, Amendments V, VI and XIV and of the Constitution of the State of New Jersey in Article I, Section 10.

The Constitution of the State of New Jersey provides:

"In all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury; to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel in his defense."

We also rely upon this constitutional provision to require the presence of the petitioner at the motion for the new trial (Pt. V[illegible]etit's Brief); which is considered an extension of the original criminal proceedings and trial.

As originally pointed out, this provision of the New Jersey Constitution was concededly never previously reviewed by a higher court (29 N. J. 561 (1959); Opinion p. 17).

**H. The "confession" was the sole and primary evidence of the People's case.**

The prosecutor cannot vacillate in his argument. We submit that the confession was the sole and primary evidence of the people's case; other "evidence" stems from the confession. If this not be so, then the prosecutor is trapped by the incongruity of his own argument since if he had sufficient material evidence, without the confession — then why did he so unnecessarily delay the arraignment of the petitioner (for 20 hours) and until he got his confession? Was the confession really to "solve" or "absolve" or was it, as we seriously contend herein, to crucify the petitioner?

The record discloses and the opinion of the Supreme Court of New Jersey supports our ground for review (by appropriate objection), by a denial of due process under the Fourteenth Amendment of the United States Constitution in the admission into evidence of the alleged "confession" of the petitioner.

Thus contrary to the prosecutor's present claims; the basis of such contention is urged herein:

1. Taking of the statement while held incommunicado for upwards of twenty (20) hours through a freezing cold night;

2. Around-the-clock prolonged and massive inquisition by in excess of a dozen officials, without counsel, no sleep, no rest, little food, and scant clothing;

3. Lack of advice as to his constitutional right to remain silent, etc. and right to counsel;

4. Failure to arraign etc.; and

5. Trickery and cajolery in attempting to get petitioner to sign the confession by a stealthily unauthorized visit to his prison cell and subsequent unlawful use of same against him (Point I, Petit's Brief).

**I. The Supreme Court of New Jersey passed upon this capital case, viewing "every conceivable legal objection", more particularly to the "controversial confession"; thus preserving and protecting petitioner's fundamental and constitutional rights, irrespective of inadequacy or neglect of trial counsel.**

With it all, the respondent adroitly avoids the real and all important issues at bar and attempts to confound justice herein by simply (and wrongfully) saying: "its non-federal" or "you didn't raise it before".

The prosecutor concludes "in any event every claim of error to the New Jersey Supreme Court was of a non-federal nature and was decided on state law". That this is an erroneous assumption and contrary to the holding of the State Court is clear indeed. "Federal" appears to be a "dreaded word" in the prosecutor's vocabulary and he appears most anxious to avoid being confronted with it before this Honorable Court.

Irrespective of whether the other errors claimed are of a federal nature (and we submit they are) the admission of the confession, the sole and primary evidence of the people's case, if considered to have been opposed upon "every conceivable legal ground" would, in the interest of justice, include every conceivable state and federal objection, as set forth in petitioner's brief. If its introduction had been opposed on "every conceivable legal ground" as the State Supreme Court of New Jersey assumed, it would assert a denial of due process, since we must look to the substance of the legal objection and not to the words; that is, the confession was not only objected to as "involuntary", but upon every conceivable legal ground!

We need not belabor petitioner's Points II, III and IV and unduly burden this Honorable Court by being presently drawn into a point by point, or line by line, defense of petitioner's contentions and answer to respondent's opposition arguments; suffice it to say that if the petition herein is granted, on the Writ of Certiorari, we shall adequately present our position, and most assuredly show this Honorable Court that our petition is most worthy of its serious consideration.

## POINT II

**The questions raised by petitioner (Points II, III and IV) as to denial of a fair and impartial trial, etc. were raised by objection in the trial Court and upon appeal and do present a further denial of due process.**

**A. The questions raised by petitioner, in this capital case, are of a substantial Federal nature, irrespective of the form of objection and errors presented by trial counsel, and it is within this Honorable Court's jurisdiction for review.**

1. Trial counsel made a "general exception" to the Judge's entire charge (*after* the jury was retired; a required but "erroneous" *procedure*) (p. 969a).

2. Objection was made to the introduction into evidence of the gruesome and prejudicial enlarged color photographs at the petitioner's trial (p. 319a).

3. Objection was made to the prosecutor's summation (p. 942a).

4. As to inadequacy of counsel; it is ridiculous for the respondent to now suggest that trial counsel who argued the appeal failed to submit *his* inadequacy of defense representation and presentation to the Appellate Court; it would hardly be compatible. But, as a "witness" at the motion for the new trial, he testified as to his "inadequacy" (app. pp. 40a, 41a; 79a-182a).

a. Petitioner had no choice in the matter of selection of appeal counsel under the Murder One conviction and mandatory death sentence.

5. As to the failure of the Judge's charge, it was *the trial court's duty* to charge all degrees of homicide as an essential basic charge in homicide cases. The failure to

submit "manslaughter" as a possible verdict cannot be winked away by the present argument of respondent, that no such specific request was made by trial counsel.

a. Whether the crime charged was common law or statutory did not matter. It was concededly not a felony-murder and lawfully and fundamentally required a charge of all degrees of homicide; *anything less, was a denial of due process and a violation of the Bill of Rights and the Fourteenth Amendment to the United States Constitution.*

b. In any event, under the erroneous and prejudicial procedure, "exceptions" to the trial judge's charge were taken after the jury had retired for deliberation; this failure of essential charges could not then be corrected!

6. The prosecutor fails to answer why a lawyer was not called for the petitioner, but makes a point of calling in a "spiritual adviser"; who, incidentally, was not of petitioner's religious faith.

## POINT III

**The petitioner does not "assume" the questions raised in the "Questions Presented for Review" as the facts, but emphatically "submits" them to be the facts.**

With a young man's life at stake, the prosecutor persists and seeks to play a "game of words". We do not equivocate, but reiterate with the same force and effect that the "Reasons for Granting Petition for Writ of Certiorari", as set forth in Petitioner's Brief herein, are the factual grounds enunciated and presented in the "Questions Presented for Review" (pp. 2-5; p. 12, Petitr's brief).

## POINT IV

**In a capital case, the inadequacy, failure and/or error of trial counsel shall not innure to the prejudice and detriment of petitioner-defendant; nor shall any State deprive any person of life or liberty without due process of law, in accordance with Sec. 1 of the Fourteenth Amendment of the United States Constitution.**

In view of the limitation of time to present this reply and for the sake of brevity, at this preliminary posture of the case, petitioner reserves further argument for a more formal and detailed submission upon the Writ of Certiorari herein.

## CONCLUSION

**We submit that substantial constitutional questions concerning violations of the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and a denial of due process have been properly raised by the petitioner, meriting review herein by this Honorable Court; therefore it is respectfully requested that in the interests of substantial justice that the petition for a Writ of Certiorari be granted.**

Respectfully submitted,

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*Attorney for Petitioner.*

ROBERT W. HICKS,
*Of Counsel.*